

No. 10877

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AL G. BARNES AMUSEMENT COMPANY, a corporation, sued as AL G. BARNES, INC., and RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA POLLINGER,

Appellee.

VOLUME I.

(Pages 1 to 384, inclusive.)

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,

Central Division

FILED

DEC 7 - 1944

PAUL P. O'BRIEN,¹
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

COMBS & MURPHINE

GEORGE P. KINKLE

JOHN S. HUNT

LEE COMBS

925 Pacific Southwest Bldg.

Los Angeles 14, Calif.

For Appellee:

DAVID C. MARCUS

416 Spring and Second Bldg.

Los Angeles 12, Calif. [1*]

In the United States District Court in and for the
Southern District of California
Central Division

No. 8367-C

AMERICA OLVERA, also known as AMERICA
OLVERA POLLINGER,

Plaintiff,

-vs-

AL G. BARNES INC., a corporation, BARNES &
SELLS FLOTO COMBINED SHOWS, a corpora-
tion, RINGLING BROS. BARNUM & BAILY
COMBINED SHOWS INC., a corporation, JOHN
DOE ONE, TWO, THREE and FOUR, JANE DOE
ONE, TWO, THREE and FOUR, CORPORATION
ONE, TWO, THREE and FOUR,

Defendants.

AMENDED COMPLAINT FOR PERSONAL
INJURIES

Plaintiff complains and alleges:—

I.

That during all times herein mentioned the defendants and each of them are corporations operating and existing under the laws of certain states in the United States at present unknown to plaintiff. That when plaintiff ascertains the state of incorporation of each of said defendants, she will ask leave of Court to amend her complaint to insert same. That the defendants and each of them have been and are now engaged in the business of operat-

ing a circus and kindred attractions to the public at large in the County of Los Angeles, State of California.

II.

Plaintiff is informed and believes and therefore alleges [2] that the defendants and each of them are all identical in ownership, management and control.

III.

That on or about the 24th day of September, 1936 plaintiff and defendant, Ringling Bros. Barnum & Baily Combined Shows, Inc., entered into a written contract in words and figures as follows to-wit:

“ARTIST’S
INDEPENDENT CONTRACTOR
AGREEMENT

This Agreement made at- as of- Sarasota, Fla., this 24th — day of September, 1936 between Ringling Bros.-Barnum & Baily Combined Shows, Inc., hereinafter called the Show, and

America Olvera

hereinafter called Artist—

Witnesseth:

1. For the lump sum of Eighty (\$80.00)—Dollars per week, payable weekly for the season of 1937 commencing on or about the Artist sells to the show his act, and in addition to said sum accepts without charge from the show (While under canvas) meals, car-lodging and transportation, common and customary in the circus business.

The Artist represents that his act in the matter of props, apparatus, property and personnel is as hereinafter set forth, and shall be maintained as is, and as represented, throughout the season to-wit:

(Insert names of artist, troupe members; give description and detail of act.)

America Olvera to present balancing trapeze act of the same standard as presented during the season of 1936. [3]

A Charge of Five Dollars Weekly Will Be Made for Each Dog or Animal Pet Carried With the Show.

It is also agreed that if the Artist is re-engaged for the following season he shall not appear at any other circus, theatre or Wild West Show in the United States without the written consent of the Show.

The term "season" represents the operating period as fixed by the Show and compensation to the Artist is definitely understood as a lump sum for the season. Because of inability of the Show to determine with exactness in advance the length of the season, installment payments to the Artist are made on a weekly basis.

The word "Artist" where herein used shall embrace and include his entire act inclusive of the Artist and the personnel of his troupe.

(a). The option is given the Show to Renew This Contract for the Next Succeeding "season" upon same terms and contract price, by giving no-

tice to Artist 30 days prior to closing date; and the Show by agreement reserves the right to transfer and place the artist during the term or part term of this contract, with any other of its shows or circuses—under its ownership or management all the terms and conditions of this contract continuing, prevailing and obtaining.

2. It is definitely understood by both parties that any changes that may from time to time be made, either in props, apparatus or personnel in the act, time of giving the act, etc. are changes exclusively under control of, and for the convenience of the Artist, and in no particular modify or restrict the Artist's relations with the Show as independent contractor and that the privileges offered Artist by the Show for meals, car-lodgings and transportation [4] are optional, of which Artist at all times has the privilege of rejecting and enjoying without restriction the freedom of procuring elsewhere or otherwise his meals, lodging and transportation.

3. Twelve performances on secular days (together with Sunday performances when given) shall constitute one week's work.

Payment to the Artist shall be reckoned only from the date of the first public performance. The Artist shall receive no payment for rehearsals during or previous to this engagement nor for any performances omitted, from whatever cause, during the season.

The Show shall hold back one week's payment of the Artist as a guarantee of good faith.

4. Upon the termination of this agreement from any cause, no claim shall be made by the Artist for the use of his or any name, lithograph, poster or other printed matter used thereafter.

5. Animals or pets not used in performances will not be allowed or carried unless by special permit of the Show; and then only upon payment of ten dollars a week for each animal or pet so carried.

6. The Artist shall at all times and places produce and present his act to the entire satisfaction of the Show.

7. The Artist's engagement with the Show is exclusive, and his act and presentation are represented as special, unique and extraordinary. During the contract period the Artist Is Prohibited from engaging or appearing with any other circus or wild west Show in the United States. For any violation of this clause, the Artist agrees that injunction or other adequate remedy restraining the Artist from performing for any other circus or wild west show before the completion of this contract, may issue out of any court of competent jurisdiction and the Show shall be entitled as liquidated damages, to a sum equal to double the amount of the Artist's compensation for the unexpired [5] period of contract.

It is expressly agreed and understood that if the show engages the Artist for the season of 1938—the Artist shall not perform in New York City between the closing of the Show of the season of 1937—and the beginning of the season of 1938—without the written consent of the Show.

8. The Artist represents that his act with the apparatus used is an ingenious creation of his own; that the "act" by reason of the Artist's skill constitutes a "feature" performance and is the consideration for this contract; that the Artist is familiar with conditions that obtain in the circus business; that he recognizes the necessity for safety of apparatus and timely presentation of his act.

The Artist shall furnish and maintain in first-class condition at his expense all paraphernalia and equipment. The Artist constructs and presents his act with personnel of troupe under his exclusive control and supervision in all particulars. The Artist assumes exclusive supervision regarding inspection of the act and premises, and agrees to keep the premises safe, and warrants that all persons appearing or practicing in the act are conversant with and suitably fitted for same.

Independent Contractor.

9. The Artist under this contract is an Independent contractor, and seeks and accepts employment as such, anything herein contained to the contrary notwithstanding.

10. The place of this contract, its status or forum is at all times Sarasota County, Florida. That in said county and State of Florida shall all matters whether sounding in contract or in tort relating to the validity, construction, interpretation and enforcement of this contract, be determined.

11. The Artist Understands, Recognizes and Confirms that

(a) The Show Is transported by the railroad, not as common carrier, but by private arrangement and [6]

(b) That to affect transportation of its outfit the show releases the railroad for claim or liability for all damages to persons or property of whatever nature of both Artist and Show; and

(c) That the Artist in accepting from the Show meals, car-lodging and transportation on its circus train receives special benefits of recognized value to the Artist, and that such special benefits constitute consideration to the Artist for his release of claim for damage of every nature and description that he may have during or after the period of performance, under this contract, against all transporting railroads and the show.

12. Now, Therefore, for valuable consideration, the Artist for himself and the persons comprising his troupe does hereby release and discharge the Show, their members, agents and servants and any transporting railroad company handling the Show's circus train movements, of and from claims, demands, causes of action, damages, liabilities or things whatsoever growing out of any injury or accident to the person and/or property of the Artist in any transaction whatsoever during period of performance under this contract and that the Artist for himself and the personnel of his troupe accepts all risks incident to the business, and assumes responsibility

as an independent contractor which condition constitutes the essence of this contract.

The Artist declares that he has read—heard read the foregoing contract and understands the same.

In Witness Wherefo, the above named parties have hereunto set their hands and seals.

RINGLING BROS.-BARNUM & BAILY
COMBINED SHOWS, Inc.

By S. W. Gumpertz (Signed) (Seal)

In Presence of

.....

.....

Artist's Permanent Address:

226 50th Street, New York City

..... (Seal)

..... (Seal)

AMERICA OLVERA" (signed) Artist [7]

IV.

That thereafter to-wit and on the 20th day of February, 1937 the said defendants, Ringling Bros. Barnum & Baily combined Shows, Inc., ordered and directed plaintiff to render her services thereunder to defendant, Al G. Barnes Inc.

V.

That on or about the 20th day of March, 1937 plaintiff pursuant to the terms of said contract and the orders and directions of said defendants, Ringling Bros. Barnum & Baily Combined Shows Inc. commenced and did render her services as a balanced trapeze artist.

VI.

That the defendants and each of them during all times during the rendition of the services by the plaintiff, pursuant to the terms of said contract did provide, maintain and furnish the maintenance, set-up and erection of the equipment and apparatus used by plaintiff in the performance of her act as trapeze artist.

VII.

That on the 11th day of September, 1937, at about the hour of 3:45 p. m. at the City of Anthony, State of Kansas, the defendants and each of them set-up, erected and maintained the said apparatus of the plaintiff herein for the performance of the services as artist pursuant to the terms of the foregoing contract.

VIII.

That the said time and place defendants, their servants,

[RBC Purs. to order of Court 1-4-44]

grossly

agents and employees did \wedge negligently and carelessly erect, maintain and set-up the said equipment and apparatus so that as a direct and proximate result of

gross [RBC 1-6-44 Purs. to Ord of Court]

said \wedge negligence and carelessness of the defendants and each of them the plaintiff while rendering her services as such trapeze artist did fall from said trapeze and was seriously and severely injured in this to-wit:- fractured [8] and dislocated left arm and shoulder; fracture and dislocation of spine; bruises and contusions about the

head, arms, body and legs; and a shock to her nervous system.

IX.

[RBC Purs. to Ord of Court 1-6-44] gross

That as a direct and proximate result of the ^ negligence and carelessness of the defendants and each of them as aforesaid and as a direct and proximate result of the injuries sustained by plaintiff, plaintiff has been damaged in the sum of Fifty Thousand (\$50,000.00) Dollars.

X.

That plaintiff is informed and believes and therefore alleges that her injuries are permanent and that she will never fully recover therefrom.

XI.

That plaintiff is informed and believes and therefore alleges that she will be compelled to incur expenses in the care and treatment of said injuries as aforesaid in the approximate sum of Seven Hundred and Fifty (\$750.00) Dollars.

XII.

Plaintiff alleges that she has incurred in the care and treatment of said injuries as aforesaid the sum of Two Hundred and Fifty (\$250.00) Dollars.

XIII.

That the defendants John Doe One, Two, Three and Four, Jane Doe One, Two, Three and Four, Corporation

One, Two, Three and Four are sued herein by their fictitious names because their true names are unknown to plaintiff, but plaintiff will ask leave of Court to amend her complaint and insert same when ascertained.

Wherefore, plaintiff prays:—judgment in the sum of Fifty One Thousand (\$51,000.00) Dollars and for such other and further relief as to this Court may seem just and proper.

DAVID C. MARCUS

David C. Marcus

Attorney for plaintiff [9]

[Verified.]

Received copy of the within Amended Complaint for Personal Injuries this 1st day of December, 1938.

Arthur Garrett

Attorney for Defendant

[Endorsed]: Filed Dec. 1, 1938. [10]

[Title of District Court and Cause.]

MOTION OF AL G. BARNES AMUSEMENT
COMPANY, a corporation, TO DISMISS

This answering defendant moves to dismiss the Amended Complaint on file herein in that it fails to state a claim, or any claim, upon which relief can be granted against this answering defendant.

Dated this 5th day of December, 1938.

Arthur Garrett

ARTHUR GARRETT

By HAL HUGHES

Attorney for defendant Al G. Barnes Amusement
Company, a corporation.

756 South Broadway, Los Angeles, California

NOTICE OF MOTION

To David C. Marcus, Esq., Attorney for Plaintiff:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at Room 482 Pacific Electric Building, Los Angeles, California, on to-wit, the 12th day of December, 1938, at the hour of 10:00 o'clock a. m. on that day, or as soon thereafter as counsel can be heard.

Dated this 5th day of December, 1938.

Arthur Garrett

ARTHUR GARRETT

By HAL HUGHES

Attorney for defendant Al G. Barnes Amusement
Company, a corporation.

756 South Broadway, Los Angeles, California

[Endorsed]: Filed Dec. 8, 1938. [11]

[Title of District Court and Cause.]

MEMORANDUM OF ORDER

Cosgrave, District Judge.

Although, under the contract the plaintiff assumes the duty of maintaining the equipment in first class condition, he pleads that the defendant actually did provide and maintain the set-up and erection of the equipment and apparatus and was negligent in this respect. Although not properly pleaded, nevertheless there seems to have been such a change as may amount to an executed oral agreement, and plaintiff should have a hearing.

The degree of negligence, and surrounding circumstances will determine whether or not the defendants are relieved under the terms of the contract.

The defendants' motion to dismiss is denied, answer to be filed within twenty days.

June 26, 1939.

Counsel notified by mail. RHM.

[Endorsed]: Filed Jun. 26, 1939. [12]

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor,

It Is Hereby Ordered that within eight (8) days from the date hereof defendant Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., a corporation, may file herein a verified answer to plaintiff's amended complaint in lieu of the unverified answer filed today, with the same force and effect as if said verified answer had been filed today.

Dated: July 17th, 1939.

H. A. HOLLZER,
Judge.

Received copy of the within Order this 17th day of July, 1939.

David C. Marcus
Attorney for Plaintiff

[Endorsed]: Filed Jul. 18, 1939. [13]

[Title of District Court and Cause.]

ANSWER OF AL G. BARNES AMUSEMENT
COMPANY, A CORPORATION, SUED HERE-
IN AS AL G. BARNES INC., A CORPORA-
TION, TO AMENDED COMPLAINT

Comes now the Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., a corporation, and answering the amended complaint on file herein, for itself and for no other defendant, admits, denies and alleges as follows:

I.

Answering Paragraph I of said amended complaint, admits that this defendant is a corporation operating and existing under the laws of one of the States of the United States, to-wit, the State of Indiana. Admits that this defendant has at all times mentioned in said paragraph been engaged in the business of operating a circus. Admits that during the months of March, 1937, and March, 1938, this defendant operated said circus in the County of Los Angeles, State of California. Denies generally and specifically every allegation in said paragraph contained which is not hereinabove expressly admitted.

II.

Answering Paragraph II of said amended complaint, this defendant denies each and every allegation contained

therein, except that it admits that, during all times mentioned in said amended complaint.

(a) The Board of Directors of this defendant consisted of: [14]

S. W. Gumpertz

Wm. Greve

F. T. Pender;

and its officers were as follows:

S. W. Gumpertz—Vice President

J. M. Kelley—Vice President

S. L. Cronin—2nd Vice President

F. T. Pender—Secretary and Treasurer

Theo. Forstall—Assistant Treasurer

Don H. Harter—Assistant Secretary;

(b) The Board of Directors of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. consisted of:

S. W. Gumpertz

J. M. Kelley

E. C. Ringling

A. B. Ringling

F. T. Pender

J. R. North

T. G. Caldwell;

and its officers were as follows:

S. W. Gumpertz—Senior Vice President

J. M. Kelley—Senior Vice President

E. C. Ringling—Vice President

A. B. Ringling—Vice President

F. T. Pender—Secretary and Treasurer

I. W. Robertson—Assistant Treasurer;

(c) The manager of the circus operated by this defendant was:

S. L. Cronin;

and the manager of the circus operated by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. was:

S. W. Gumpertz;

(d) The entire capital stock of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. was held in a voting trust of [15] which the voting trustees were:

Wm. Greve

S. W. Gumpertz

J. M. Kelley

F. T. Pender

John Ringling (died, December 1st, 1936);

(e) The entire capital stock of this defendant was owned and controlled by Circus Zoological Gardens, Inc., an Indiana corporation, all of whose capital stock in turn was held in a voting trust of which the voting trustees were:

Wm. Greve

S. W. Gumpertz

J. M. Kelley

F. T. Pender

John Ringling (died, December 2nd, 1936);

[WPD JR] ~~1st~~

and this defendant denies that the beneficial interests in the two voting trusts referred to in subsections (d) and (e) above are identical.

III.

Answering Paragraph III of said amended complaint, this defendant admits the allegations thereof.

IV.

Answering Paragraph IV of the amended complaint, this defendant is without information or belief on the subject sufficient to enable it to answer, and basing its denials on that ground, denies generally and specifically each and every allegation in said paragraph contained.

V.

Answering Paragraph V of said amended complaint, this defendant is without information or belief on the subject sufficient to enable it to answer, and basing its denials on that ground, denies generally and specifically each and every allegation in said [16] paragraph contained, except that it admits that on or about the 20th day of March, 1937, plaintiff commenced and did render her services as a balanced trapeze artist.

VI.

Answering Paragraph VI of said amended complaint, this defendant denies generally and specifically each and every allegation in said paragraph contained.

VII.

Answering Paragraph VII of said amended complaint, this defendant denies generally and specifically each and every allegation in said paragraph contained.

VIII.

Answering Paragraph VIII of said amended complaint with respect to the injuries set forth in said paragraph,

this defendant is without sufficient information or belief on the subject to enable it to answer, and basing its denials upon said ground, denies that said injuries, or any of them, were received by plaintiff.

This defendant admits that plaintiff fell and was injured.

This defendant admits that said fall and injury occurred at Anthony, Kansas. This defendant denies that said fall occurred on September 11th, 1937, and on the contrary alleges that said fall occurred on September 12th, 1937.

This defendant denies each and every allegation in said paragraph contained not hereinabove specifically admitted or denied for want of information or belief.

IX.

Answering Paragraph IX of said amended complaint, this defendant denies that it was ever negligent or careless at all. With respect to the claim of damages in said paragraph contained, this defendant denies that plaintiff has been damaged at all through any fault of this defendant, or that plaintiff has been damaged in [17] the sum of Fifty thousand dollars (\$50,000.00), or any other sum, or at all.

X.

Answering Paragraph X of said amended complaint, this defendant is without information or belief on the subject sufficient to enable it to answer, and basing its denials on said ground, denies generally and specifically each and every allegation therein contained.

XI.

Answering Paragraph XI of said amended complaint, this defendant is without information or belief on the subject sufficient to enable it to answer the allegations therein contained, or any of them, and basing its denials upon said ground, denies each any every allegation therein contained.

XII.

Answering Paragraph XII of said amended complaint, this defendant is without information or belief on the subject to enable it to answer the allegations therein contained, and basing its denials upon said ground, denies each and every allegation in said paragraph contained.

And for a Further, Second and Separate Defense to the Amended Complaint on File Herein, Defendant Admits, Denies and Alleges as Follows:

I.

Realleges Paragraphs I to XII inclusive of its first defense herein and makes the same a part hereof the same as if hereat set out at length.

II.

Alleges that the amended complaint fails to state a claim against defendant upon which relief can be granted.

And for a Further, Third, Separate and Distinct Defense to the Amended Complaint on File Herein, This Defendant Admits, De- [18] nies and alleges as follows:

I.

Realleges Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, the same as if hereat set out at length.

II.

That at the time and place of the occurrence of the injury to plaintiff alleged in her amended complaint, plaintiff was employed by this defendant and that said injury, if any, to plaintiff arose out of, and occurred in the course of, her said employment by this defendant. That the contract of employment whereunder plaintiff was so employed by this defendant was made in the State of California; that at the time of the injury alleged plaintiff was a resident of the State of California; that under and by virtue of the laws of the State of California, and in particular the California Workmen's Compensation Insurance and Safety Act of 1917, and the Acts Amendatory thereto, and in particular Sections 55-a and 58 thereof (California Labor Code Sections 5300, 5301, and 5305), the Industrial Accident Commission of the State of California, is given sole and exclusive jurisdiction of the claim asserted by plaintiff herein; that this Court has no jurisdiction herein.

And for a Fourth, Separate and Distinct Defense to the Amended Complaint Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Realleges Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, the same as if hereat set out at length.

II.

That the accident described by plaintiff's amended complaint, and the injuries or damages, if any, alleged to have been sustained by plaintiff by reason thereof, were

solely and proximately [19] and exclusively sustained by plaintiff, if at all, by reason of an unavoidable and inevitable accident, so far as this defendant is concerned.

And for a Further, Separate and Fifth Defense to the Amended Complaint on File Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Repeats the allegations of Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, the same as if hereat set out at length.

II.

That the accident referred to in said amended complaint, and the injuries and damages alleged to have been sustained by plaintiff, if any, were solely and directly and proximately caused by the negligence of the plaintiff.

And for a Further, Separate and Sixth Defense to the Amended Complaint on File Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Realleges Paragraphs I to XII inclusive of the First defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof the same as if hereat set out at length.

II.

Alleges that the accident referred to in the said amended complaint and the injuries and damages alleged to have been sustained by plaintiff, if any, were directly and proximately caused by the negligence of the plaintiff, thereunto contributing.

And for a Further, Separate and Seventh Defense Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Repeats Paragraphs I to XII inclusive of the first [20] defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof as if hereat set out at length.

II.

That plaintiff has heretofore released and discharged this defendant from the claim and cause of action sued upon herein.

And for a Further, Separate and Eighth Defense Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Repeats Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof as if hereat set out at length.

II.

That at the time and place of the accident sued on herein plaintiff, as employee, was engaged in the performance of services for this defendant, as employer, and that by agreement with this defendant plaintiff had assumed for herself exclusively all risks incident to such employment, including risk of the accident sued on herein and said accident, and had released and discharged this defendant of and from all claims, demands, causes

of action, damages, liabilities, or things whatsoever, growing out of any injury or accident to plaintiff while performing said services.

And for a Further Separate and Ninth Defense Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Repeats Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof as if hereat set out at length.

II.

That at the time and place of the accident sued on herein plaintiff, as independent contractor, was engaged in the performance of services for this defendant, as principal, and that by agreement with this defendant plaintiff had assumed for herself exclusively [21] all risks incident to such services, including risk of the accident sued on herein and said accident, and had released and discharged this defendant of and from all claims, demands, causes of action, damages, liabilities or things whatsoever growing out of any injury or accident to plaintiff while performing said services.

Wherefore, this defendant prays that plaintiff take nothing by this action, and that this defendant go hence with its costs.

ARTHUR GARRETT

Attorney for defendant Al G. Barnes Amusement
Company, sued herein as Al G. Barnes Inc.,
a corporation [22]

[Verified.]

[Endorsed]: Filed Jul. 24, 1939. [23]

[Title of District Court and Cause.]

SEPARATE ANSWER OF RINGLING BROS.-
BARNUM & BAILY COMBINED SHOWS,
INC.

Comes now defendant Ringling Bros.-Barnum & Baily Combined Shows, Inc., a corporation, and answering plaintiff's Amended Complaint on file herein admits, denies and alleges as follows:

I.

Answering Paragraph I thereof, this answering defendant admits that it is a corporation operating and existing under and by virtue of the laws of one of the states of the United States, to-wit, the State of Delaware; admits that defendant Al G. Barnes Amusement Company, a corporation, is a corporation duly organized and existing under and by virtue of the laws of one of the states of the United States, to-wit, the State of Indiana; admits that this answering defendant and defendant Al G. Barnes Amusement Company have been and were during the times referred to in plaintiff's Amended Complaint, operating circuses and that each of said defendants has operated a circus in the County of Los Angeles, State of California but in this connection alleges that at the time of the accident complained of in plaintiff's amended complaint this answering defendant was not operating a circus in the County of Los Angeles, State of California, but was operating a circus in the State of Oklahoma; alleges that this answering defendant has no information or knowledge sufficient to form a belief as to the truth of the [24] remaining allegations in said amended complaint, and basing its denial on said lack of

knowledge and information denies each and several all the remaining allegations in said Paragraph I contained.

II.

Answering Paragraph II thereof, this answering defendant refers to Paragraph III of the Answer of Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., a corporation, to plaintiff's Amended Complaint on file herein, and by this reference makes each and several the allegations commencing with line 30, page 1, and running to and including line 18, page 3 thereof, a part of this its answer to Paragraph II of plaintiff's Amended Complaint on file herein, incorporates the same herein, and each and several the admissions and denials therein contained, and makes them a part hereof and makes them its answer to Paragraph II of plaintiff's amended complaint on file herein; denies each and several all the remaining allegations in said Paragraph II contained.

III.

Answering Paragraph IV thereof, this answering defendant denies each and several all the allegations therein contained.

IV.

Answering Paragraph V thereof, this answering defendant admits that on or about the 20th day of March, 1937, plaintiff commenced to and did render her services as a balanced trapeze artist to Al G. Barnes Amusement Company; denies each and several all the remaining allegations in said Paragraph V contained.

V.

Answering Paragraph VI thereof, this answering defendant denies each and several the allegations therein contained.

VI.

Answering Paragraph VII thereof, this answering defendant denies each and several the allegations therein contained. [25]

VII.

Answering Paragraph VIII thereof, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations respecting the injuries set forth in said paragraph, and basing its denial upon said lack of knowledge or information denies that said injuries as related by plaintiff in said paragraph, were received; admits that plaintiff fell and was injured; admits that said fall and injury occurred at Anthony, Kansas; alleges that said fall occurred on September 12, 1937; denies generally and specifically each and several all the remaining allegations in Paragraph VIII contained, not otherwise herein specifically admitted.

VIII.

Answering Paragraph IX thereof, this answering defendant denies generally and specifically each and several all the allegations therein contained.

IX.

Answering Paragraph X thereof, this answering defendant alleges that it is without knowledge or informa-

tion sufficient to form a belief as to the truth of the allegations therein contained, and basing its denial on said lack of information or knowledge denies each and several the allegations therein contained. [26]

X.

Answering Paragraph XI thereof, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and basing its denial on said lack of information or knowledge denies each and several the allegations therein contained.

XI.

Answering Paragraph XII thereof, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and basing its denial on said lack of information or knowledge denies each and several the allegations therein contained.

XII.

Denies generally and specifically that because of any act, omission, recklessness, carelessness or negligence on the part of this answering defendant, the accident referred to in the amended complaint on file herein occurred, or that plaintiff has been damaged in the sum of \$50,000.00 or in any other sum or sums whatsoever, or at all.

For a Separate, Affirmative and Distinct Defense This Answering Defendant Alleges as Follows:

I.

That the injury to plaintiff specified in the Amended Complaint on file herein was due to and proximately caused by the carelessness and negligence of plaintiff, and this answering defendant further alleges that all risks and dangers of the employment in which plaintiff was engaged and of her place and work, were at the time of the injury to plaintiff on said 12th day of September, 1937, and at all times for many months immediately preceding and prior thereto, had been seen by and fully known to plaintiff, and understood and appreciated by her, and that all said risks and dangers were [27] assumed by plaintiff during all said time; that the nature, extent and construction of the trapeze and trapeze equipment operated and performed upon by plaintiff, and owned by her, as well as the other equipment belonging to the defendant Al G. Barnes Amusement Company, used in the performance of the act and trapeze performance by plaintiff herein at the time and place of the injury to her referred to in plaintiff's amended complaint herein, and the risks and dangers incident thereto, were open, obvious and apparent and fully understood by and known to plaintiff at all times during her said employment prior to said accident, and that plaintiff carelessly and negligently fell from said trapeze in the performance of her act; that said plaintiff knew all the risks and dangers of said employment; that at the time of the fall which resulted in the injury occurring on September 12, 1937, and for many years prior thereto, said plaintiff was of good and sound general mentality and mental condition, had full

and complete knowledge of the business and occupation in which she was engaged, to-wit, that of trapeze performer and artist, and had had many years of experience extending from her childhood up to the time of her accident; that at the time of the accident which took place on September 12, 1937, plaintiff was of mature age, to-wit, of about the age of 28 years, and had been engaged for more than 20 years prior thereto in the occupation and business of trapeze performer and artist.

For a Second, Separate and Distinct Defense This Answering Defendant Alleges:

I.

That any injuries which plaintiff may have sustained at the time and place referred to in plaintiff's amended complaint, were proximately caused by her own carelessness and negligence or by the negligence or carelessness of her fellow workmen and in no way by negligence on the part of this answering defendant; that [28] none of said fellow servants directly or indirectly represented this answering defendant but that they did represent and act for and on behalf of plaintiff; that none of said fellow workmen acted in a capacity superior to plaintiff; that all of said fellow workmen were employees chosen by the same employer as plaintiff was employed by, to-wit, Al G. Barnes Amusement Company, and chosen by it with due care, and were engaged in accomplishing and promoting the same general purposes and ends as this plaintiff was engaged in accomplishing and promoting at the time and place of said accident, and that all of said fellow workmen were skilled in the occupation in which they were engaged.

For a Third, Separate and Distinct Defense This Answering Defendant Alleges:

I.

That plaintiff herself did not exercise ordinary care, caution or prudence in the premises to avoid the accident referred to in plaintiff's amended complaint and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of plaintiff in the premises.

For a Fourth, Separate and District Defense This Answering Defendant Alleges:

I.

That at the time of the alleged accident and injury to plaintiff, she was in the service and an employee of the defendant, Al G. Barnes Amusement Company, as a trapeze performer and artist, in a circus act owned and operated by the defendant Al G. Barnes Amusement Company; that there was then and there in said circus diverse other employees of the defendant Al G. Barnes Amusement Company, in like manner engaged and employed by and acting for the defendant Al G. Barnes Amusement Company, in promoting the same [29] general purposes and ends as plaintiff was accomplishing and promoting, and were assisting plaintiff in her performance, to-wit, rigging-man or rope holder, and husband of plaintiff, and eight net holders; that all of said employees were then and there fellow servants with the plaintiff in one and the same line of employment; that in the selection and employment of said co-employees the defendant Al G. Barnes Amusement Company exercised due and reasonable care and the said co-employees were competent, skillful and

prudent persons in their respective positions, and that none of said co-employees acted in a capacity superior to plaintiff, and that none of said co-employees, directly or indirectly, represented this answering defendant or the defendant Al G. Barnes Amusement Company in any capacity other than assistant to the plaintiff in the performance of her act; that if there was any negligence or carelessness other than that of plaintiff, by means of which said accident and injury happened to plaintiff, it was the negligence or carelessness of said co-employees, or one or some of them, and not of this answering defendant or the defendant Al G. Barnes Amusement Company, or any other person.

For a Fifth, Separate and Distinct Defense This Answering Defendant Alleges:

I.

That at the time and place of the alleged injury to plaintiff, plaintiff was employed by the defendant Al G. Barnes Amusement Company as an independent contractor, in the performance of a circus act known as a trapeze act, and as such independent contractor it was the express duty of plaintiff, under and by the terms of her contract, said contract being on file herein as Paragraph III of plaintiff's amended complaint and by this reference thereby made a part of this affirmative defense, to furnish, inspect and look after all the defects, if any, in the paraphernalia, appliances and equipment used in her

act or performance, and the plaintiff assumed exclusive supervision regarding inspection of the act and [30] premises, and plaintiff had full right and authority, and it was her express duty, to remedy, repair any and all defects in said appliances and equipment, if any existed during her said employment, and to keep the same in a safe and suitable condition.

II.

That the injury to plaintiff was not caused by any act, error, omission, carelessness or negligence of this answering defendant or the defendant Al G. Barnes Amusement Company, but was caused solely by the carelessness and lack of diligence of plaintiff in not furnishing proper and safe appliances, paraphanelia and equipment, and not keeping the same in a good, suitable and safe condition, which said carelessness and negligence on the part of plaintiff was the proximate cause of her injury.

For a Sixth, Separate and Distinct Defense This Answering Defendant Alleges:

I.

That at the time and place of the accident sued on herein, plaintiff as an employee of the Al G. Barnes Amusement Company, was engaged in the performance of services for said Al G. Barnes Amusement Company, as employer, and that by agreement with said Al G. Barnes Amusement Company had assumed for herself exclusively all risks incident to such employment, includ-

ing the risk of the accident sued on herein, and said agreement released and discharged all of the defendants in this action of any of the claims, demands, causes of actions, damages, liabilities or things whatsoever growing out of any injury or accident to plaintiff while performing said services for defendant Al G. Barnes Amusement Company, or for any other person or individual under and by virtue of the terms of the contract set forth in the Amended Complaint herein, or otherwise or at all. [31]

Wherefore, this answering defendant prays that plaintiff take nothing by way of her amended complaint on file herein, for costs of suit incurred herein, and for such further relief as to the Court may seem just and equitable.

COMBS & MURPHINE

By LEE COMBS

Attorneys for defendant Ringling Bros.-Barnum & Baily
Combined Shows, Inc. [32]

[Verified.]

[Endorsed]: Filed Oct. 9, 1939. [33]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF AL G. BARNES
AMUSEMENT COMPANY, A CORPORATION,
SUED HEREIN AS AL G. BARNES, INC., A
CORPORATION.

Comes now defendant Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes, Inc., a corporation, and amends its answer on file herein by adding the following:

And for a Further, Separate and Eighth Defense Herein, this defendant admits, denies and alleges as follows:

I.

Repeats Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof the same as if hereat set out at length.

II.

That the injury to plaintiff specified in the amended complaint on file herein was due to and proximately caused by the carelessness and negligence of plaintiff, and this answering defendant further alleges that all risks and dangers of the employment in which plaintiff was engaged, and of her place and work, were at the time of the injury to plaintiff on said 12th day of September, 1937, and at all times for many months immediately preceding and prior thereto had been, seen by and fully known to plaintiff, and understood and appreciated by her, and that all said risks and dangers were assumed by plaintiff during all said time; that the nature, [34] extent and construction of the trapeze and trapeze equipment operated and performed upon by plaintiff, and owned by her, as

well as the other equipment belonging to the defendant Al G Barnes Amusement Company used in the performance of the act and trapeze performance by plaintiff herein, at the time and place of the injury to her referred to in plaintiff's amended complaint herein, and the risks and dangers incident thereto, were open, obvious and apparent and fully understood by and known to plaintiff at all times during her said employment prior to said accident, and that plaintiff carelessly and negligently fell from said trapeze in the performance of her act; that said plaintiff knew all the risks and dangers of said employment; that at the time of the fall which resulted in the injury occurring on September 12th, 1937, and for many years prior thereto, said plaintiff was of good and sound general mentality and mental condition, had full and complete knowledge of the business and occupation in which she was engaged, to-wit, that of trapeze performer and artist, and had had many years of experience in trapeze performances extending from her childhood up to the time of her accident; that at the time of the accident which took place on September 12th, 1937, plaintiff was of mature age, to-wit, of about the age of twenty-eight years, and had been engaged for more than twenty years prior thereto in the occupation and business of trapeze performer and artist.

And for a further, Separate and Ninth Defense Herein, this defendant admits, denies and alleges as follows:

I.

Repeats Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof the same as if hereat set out at length.

II.

That any injuries which plaintiff may have sustained at [35] the time and place referred to in plaintiff's amended complaint, were proximately caused by her own carelessness and negligence, or by the negligence or carelessness of her fellow workmen, and in no way by negligence on the part of this answering defendant. That all of said fellow servants acted for and represented plaintiff; that none of said fellow workmen acted in a capacity superior to plaintiff; that all of said fellow workmen were employees chosen by the same employer as plaintiff was employed by, to-wit, this answering defendant, and chosen by it with due care, and were engaged in accomplishing and promoting the same general purposes and ends as this plaintiff was engaged in accomplishing and promoting at the time and place of said accident, and that all of said fellow workmen were skilled in the occupation in which they were engaged.

And for a Further, Separate and Tenth Defense Herein, this defendant admits, denies and alleges as follows:

I.

Repeats Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof the same as if hereat set out at length.

II.

That at the time of the alleged accident and injury to plaintiff, she was in the service of, and an employee of, this answering defendant, as a trapeze performer and artist, in a circus act owned and operated by this answer-

ing defendant; that there were then and there in said circus act divers other employees of this answering defendant, in like manner engaged and employed by and acting for this answering defendant in promoting the same general purposes and ends as plaintiff was accomplishing and promoting, and were assisting plaintiff in her performance, to-wit, rigging man or rope holder, and husband of plaintiff, and eight net holders; that all of said employees were then and there fellow [36] servants with the plaintiff in one and the same line of employment; that in the selection and employment of said co-employees, this answering defendant exercised due and reasonable care, and the said co-employees were competent, skillful and prudent persons in their respective positions, that none of said co-employees acted in a capacity superior to plaintiff, that none of said co-employees directly or indirectly represented this answering defendant in any capacity other than assistant to the plaintiff in the performance of her act; that if there was any negligence or carelessness other than that of plaintiff by means of which said accident and injury happened to plaintiff, it was the negligence or carelessness of said co-employees, or one or some of them, and not of this answering defendant, or any other person.

Arthur Garrett

ARTHUR GARRETT

Attorney for Defendant Al G. Barnes Amusement
Company, a corporation, sued herein as Al G.
Barnes, Inc., a corporation.

[Endorsed]: Filed Jan. 18, 1940. [37]

[Title of District Court and Cause.]

AMENDMENT TO
~~AMENDED~~ ANSWER OF DEFENDANTS

Come now defendants and answering the amendment and amendment by interlineation of plaintiff's amended complaint herein, in addition to their answer heretofore made to said complaint which same is incorporated herein, and reallege each and several the allegations therein made as if set forth verbatim herein; allege that the claim of plaintiff herein is barred by the terms, conditions and provisions of the statute of limitations, being particularly the provisions of Part 2, Title 2, Chapter III of the Code of Civil Procedure of the State of California and in particular the terms and provisions of Section 340 C. C. P.

COMBS & MURPHINE

By Lee Combs

Attorneys for defendants [38]

[Verified.]

[Endorsed]: Filed Jan. 6, 1944. [39]

[Title of District Court and Cause.]

ORDER

Under Rule 16 of Rules of Civil Procedure

This cause coming on under the Order of the Court heretofore issued directing the Attorneys to appear at Chambers, pursuant to Rule 16 of the Rules of Civil Procedure for conference; appeared David Marcus, attorney for the plaintiff and the plaintiff in her own proper person; and Arthur Garrett, attorney for the defendant Al G. Barnes Amusement Company, a Corporation. It was thereupon ordered that pursuant to said Rule the conference proceed. After discussing the pleadings and issues, it was stipulated by the plaintiff and the defendant that the contract of Sept. 24, 1936, in suit, was entered into by the said parties in the State of Florida; and that the accident in issue occurred in the State of Kansas; that the signature to the letter dated Feby. 25, 1937, at Sarisota, Florida, on the letter head of Ringling Bros.-Barnum & Bailey, Combined Shows, Inc., directed to Miss America Olvera, is the signature of Pat Valdo; that plaintiff is also known as America Olvera Pollinger. The attorney for defendant for lack of information was unable to further stipulate until facts are ascertained from his clients in New York.

After further conference it was ordered that plaintiff amend her complaint incorporating therein the contract of Sept. 24, 1936, declared on, in haec verba, within five

days, and that defendant answer under oath within twenty days by specific, direct and positive answers, not on information and belief, each and all allegations [40] with reference to the corporate relation of the defendant Al G. Barnes Amusement Company, a corporation, to Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

It was further ordered that further conferences be postponed until the attorney for the defendant is further advised, and until after filing of the defendant's answer to the amended complaint; and that the case be placed on the assignment calendar for Nov. 28, 1938, for fixing a time of trial.

This order is entered pursuant to and in compliance with Rule 16 of the Pre-Trial Procedure of the Rules of Civil Procedure for District Courts of the United States, and will control the subsequent course of this action.

Dated this 3rd day of November, 1938.

JEREMIAH NETERER
U. S. District Judge.

[Endorsed]: Filed Nov. 4, 1938. [41]

[Title of District Court and Cause.]

MOTION FOR DIRECTED VERDICT

Come now defendants, by Combs & Murphine, their attorneys, and hereby move the Court to direct a verdict in favor of defendants and against plaintiff herein on the following grounds and for the following reasons:

I.

That the contract sued upon in this case is a contract made under the laws of the State of Florida and contains a clause releasing defendants *of* any contracting parties from any liability for damages which might have occurred to any participants under the contract, and in this connection further call the Court's attention to the fact that there is no evidence of gross negligence in this case and none has been proven by plaintiff herein, and no facts or circumstances have been shown or proven constituting a release or waiver from the release clause contained in plaintiff's contract, plaintiff's Exhibit No. 1 in this action, and that the same is of [42] binding force and effect upon the plaintiff and bars and prohibits her recovery in this action.

II.

Upon the ground that there has been no evidence whatsoever of any kind or nature produced to the effect that Ringling Bros.-Barnum & Bailey Combined Shows, Inc. were the employers or that plaintiff worked for Ringling Bros. at the time the accident in this case occurred, and further that there is no evidence in any way linking or tying up Ringling Bros. to the negligence claimed and alleged in this action by plaintiff herein as having oc-

curred to her on the date of the accident, which occurred at Anthony, Kansas, September 12, 1937, or at all; that there is no evidence whatsoever in this action that Ringling Bros. controlled or regulated the conduct and operation of the Al G. Barnes Show at Anthony; Kansas, on September 12, 1937, or in any manner whatsoever; that there is evidence to the effect that Ringling Bros. and Al G. Barnes are separate corporate entities under separate management and control.

III.

Upon the further grounds that the injuries suffered by the plaintiff in this action were the result, if at all, by the contributory negligence as a matter of law of herself and of her agents, including her husband, Karl Pollinger, in the management, operation, and use of her trapeze equipment.

IV.

That the injury suffered by plaintiff in this action has been conclusively proven and shown to have arisen from the negligence if there was any negligence at all, of fellow servants of plaintiff engaged in the production of an enterprise on behalf of defendant Al. G. Barnes Show, together with the fact that plaintiff was an independent contractor, does not relieve her from the law of Kansas providing that her employer is not liable for injuries occurring to her through the negligent act of her fellow servants. [43]

V.

That the injuries in this matter were the result of a course of action adopted by plaintiff with full knowledge

of the nature and character of her act and by her as an experienced, mature person cognizant thereof and of the risks and hazards in connection therewith, and that she assumed all the risks and hazards of her employment. In this connection:

(a) That she assumed the risks and hazards of her employment and her act as a trapeze artist in general;

(b) That if there are any general risks occurring as the result of the operation and management of her equipment by the defendants, she assumed the risk and hazard of such additional risks, if any there were, and knew about them and in that connection she knew about the risks and hazards of falling beyond a net used and employed and held directly under her trapeze for the purpose of catching her in the event she fell, if such were the fact.

(c) That the claim is barred by the statute of limitations.

(d) No gross negligence and no wanton or willful misconduct has been proven and the contract relieves defendants of any liability.

We respectfully urge the Court that on each and all of the foregoing grounds the Court should direct a verdict in favor of defendants in this action.

COMBS & MURPHINE

By Lee Combs

Attorneys for defendants

[Endorsed]: Filed Jan. 11, 1944. [44]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the 11th day of January, in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable C. E. Beaumont, District Judge.

No. 8367-B

America Olvera, etc.,

Plaintiff,

v.

Al G. Barnes Amusement Company, a corporation, and
Ringling Bros.-Barnum & Bailey Combined Shows,
Inc.,

Defendants.

This cause coming on for further trial. . . .

xx xx xx

Attorney Combs files motion for directed verdict in favor of defendants, states the grounds thereof, and argues. Attorney Marcus argues in opposition. The motion is denied. [45]

[Title of District Court and Cause.]

JURY INSTRUCTIONS

Court's Instruction No. A

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as the court gives it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose.

Given by the court of its own motion.

Beaumont,
J.

G. [46]

Plaintiff's Instruction No. 1

The care to be exercised in a given situation is dependent upon the danger and hazard sought to be avoided. If the danger involved in an undertaking is great, then the care and caution required in its operation is correspondingly great; for under the law as given by these instructions the amount of care and caution must vary in accordance with the nature of the act and surrounding circumstances, and such care and caution increase as does the danger reasonably to be apprehended.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

R.

Covered [47]

Plaintiff's Instruction No. 2

To establish the defense of contributory negligence the burden is upon the defendants to prove by a preponderance of evidence that the plaintiff was negligent and also that such negligence contributed in some degree so that it was a *proximate* cause of the injury.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

R. [48]

Plaintiff's Instruction No. 3

Negligence is the doing of some act which a reasonable and prudent person would not do, or the failure to do something which a reasonable and prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

Objected to

R. [49]

Plaintiff's Instruction No. 4

Any evidence that has been received of an act or omission or declaration of a party which is unfavorable to his own interest should be considered and weighed by you like any other admitted evidence, but evidence of oral admission of a party other than his own testimony in the trial ought to be viewed by you with caution.

Given✓.....

Refused.....

C. E. Beaumont,
Judge

#3
objection

G [50]

Plaintiff's Instruction No. 5

A witness false in one part of his testimony is to be distrusted in others, that is to say you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point unless from all the evidence you believe that the probability of truth favors his testimony in other particulars.

Given✓.....

Refused.....

C. E. Beaumont,
Judge

G [51]

Plaintiff's Instruction No. 6

The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of the witness and after weighing the various factors of the evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of one witness.

Given✓.....

Refused.....

C. E. Beaumont,
Judge

G [52]

Plaintiff's Instruction No. 7

Your verdict must be based solely on the evidence received and the law as given you in these instructions, and not upon anything you may have otherwise heard or read. The instructions are to be considered as a whole.

Given✓.....

Refused.....

C. E. Beaumont,
Judge

G [53]

Court's Instruction No. B

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation concerning the existence of a fact or facts.

You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court; such evidence is to be treated as though you never had heard it.

~~You are to decide this case solely upon the evidence that has been admitted by the court herein, considered in the light of the instructions of the court. The instructions are to be considered as a whole.~~

Given by the court of its own motion.

G. [54]

Plaintiff's Instruction No. 8

You are the sole and exclusive judges of the facts in this case and of the credibility of the witnesses. Your power of judging however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of legal evidence. You are not bound to believe the testimony of any witness unless ^{such} testimony imparts verity and establishes conviction in your minds. Nor are you bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a lesser number or against other evidence satisfying your minds.

Every witness is presumed to speak the truth. This presumption may be repelled by the manner in which he or she testifies, by his or her interest in the case if any is shown by the evidence, his or her partiality or impartiality, by the reasonableness or unreasonableness of any statement he or she makes, by his or her candor and fairness, or lack thereof, and by any other fact or circumstance elicited during the trial which may aid you in determining as to whether the witness has spoken the truth.

Given as modified

Refused.....

C. E. Beaumont,
Judge

G [55]

Plaintiff's Instruction No. 9

The term "preponderance of the evidence" means that the evidence on one side is of greater weight than the evidence produced on the opposite side; it does not mean necessarily that a preponderance is produced by a greater number of witnesses—it is the greater weight of the credible evidence as it may appear to the minds of the jury.

Given✓.....

Refused.....

C. E. Beaumont,
Judge

G [56]

Court's Instruction C

The burden is upon a plaintiff alleging gross negligence to prove such negligence by a preponderance of the evidence, and that such gross negligence was the proximate cause of injury to the plaintiff. To establish the defense of contributory negligence, the burden is upon the defendant to prove by a preponderance of evidence that the plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of the injury. Contributory negligence may be inferred from the whole evidence, or a part thereof, without regard to which party or parties introduced such evidence.

Given by court of own motion.

Beaumont,

J. [57]

Plaintiff's Instruction No. 10

A plaintiff who brings an action has the duty, before he can be permitted to recover, to establish all of the material allegations of his complaint by a preponderance of the evidence. A defendant who pleads contributory negligence of a plaintiff by way of defense has the burden such

of proving ~~that~~ negligence by a preponderance of the evidence. ~~Contributory negligence may be inferred, however, from all or any of the evidence in the case whether presented by plaintiff or defendant.~~

Given.....

Refused✓.....

C. E. Beaumont,

Judge

G. as m.

Copy 116-A. [58]

Plaintiff's Instruction No. 11

A principal is responsible for the acts of his agents and employees performed within the scope of their employment. You are instructed that the contract in evidence between plaintiff and defendants Ringling Brothers, among other things provides "the show by agreement reserves the right to transfer and place the artist during the term or part term of this contract with any other of its shows or circuses under its ownership or management all terms and conditions of this contract continuing, prevailing and obtaining—" and you further find that defendant Ringling Brothers did transfer and place the artist with the Al G. Barnes Amusement Company who was then under the management or ownership of defendant Ringling Brothers, then if you find plaintiff is entitled to recover your judgment must be against both defendants Ringling Brothers and Barnes Amusement Company.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

Withdrawn [59]

Plaintiff's Instruction No. 12

If you find from a preponderance of the evidence that
their
defendants, ~~its~~ servants, agents and employees were grossly negligent in the erection and maintenance of plaintiff's rigging or were grossly negligent in the maintenance and operation of the net in question which proxi-

matley caused or contributed to plaintiff's injuries then I charge you your verdict must be in favor of plaintiff and against the defendants. Ringling Brothers, Barnum and Bailey Combined Shows and Al G. Barnes Amusement Company.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

R. [60]

Plaintiff's Instruction No. 13

You are instructed that gross negligence has been defined as the want or absence of or failure to exercise slight care or diligence. The term implies a Thoughtless disregard of consequences, it is a relative term, which is to be understood as meaning a greater want of care than is implied by the term ordinary negligence; but the circumstances of each particular case are to be taken into consideration, and what might be merely ordinary negligence under one set of circumstances or conditions might constitute gross negligence under other conditions or circumstances.

(45 Corpus Juris, 668)

Given.....

Refused✓.....

C. E. Beaumont,
Judge

To present
authority [61]

Plaintiff's Instruction No. 14

If you find that plaintiff's apparatus at the time and place in question was set up by the defendant Al G. Barnes Amusement Company, its servants and employees, in a grossly negligent and careless manner, or that the safety net was operated and maintained in a grossly careless and negligent manner, and that the injuries of plaintiff were solely and proximately caused as a result of such carelessness and negligence on the part of the said defendant, its servants and employees, then I charge you that your verdict must be in favor of plaintiff and against the defendant Al G. Barnes Amusement Company. If you further find that the said defendant Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Bros.-Barnum & Bailey Combined Shows, you must also return your verdict for the plaintiff and against said defendant Ringling Bros.-Barnum & Bailey Combined Shows.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

May be withdrawn [62]

Plaintiff's Instruction No. 14-A

If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks incident to the act which

she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if any there was, either in the erection and placing in position of said trapeze or in the maintenance and operation of said net, was the proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which [63] proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

If you further find that the said Al G. Barnes Amusement Company was then and there under the manage-

ment and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows.

Given at plaintiff's request.

Beaumont,

J. [64]

Plaintiff's Instruction No. 15

If you find that plaintiff's apparatus at the time and place in question was erected, set up and maintained by the defendants, *it* servants, agents and employees, in a grossly negligent and careless manner, or that the safety net was operated and maintained by defendants in a grossly careless and negligent manner, and that the injuries of plaintiff were proximately caused as a result of such carelessness and negligence on the part of said defendants, then I charge you that your verdict must be in favor of plaintiff and against defendants.

Given.....

Refused✓.....

C. E. Beaumont,

Judge

Same as 14 [65]

Plaintiff's Instruction No. 16

If after considering the evidence you find the plaintiff is entitled to recover, you will consider in fixing the amount of the award the elements of damage that I now am about to mention; the reasonable value of plaintiff's time lost, if any, since her injury wherein she has been unable to pursue her occupation. In determining this amount you should consider evidence of plaintiff's earnings and the manner in which she ordinarily occupied her time before the injury, find what she was reasonably certain to have earned in the time lost had she not been disabled; you will also consider not only the element of damage heretofore mentioned but also such sum as will reasonably compensate plaintiff for the pain, discomfort and anxiety, if any, as she has suffered by her and proximately resulting from the injury in question; and for such pain, discomfort and anxiety, if any, as she is ~~reasonably~~ certain to suffer in the future from the same cause. Also the sum as will reasonably compensate plaintiff from any loss of earning power occasioned her by the injury in question and from which she is ~~reasonably~~ certain to suffer in the future. In fixing this amount you will consider what plaintiff's health, physical ability and earning power were before the accident, and what they are now, the nature and extent of her injuries, whether or not they are reasonably certain to be permanent or if not permanent, the extent of their duration all to the end of determining the effect of her injuries

upon her by the earning capacity and the present value of the loss so suffered. Damages, if given, must be reasonable and your award, if any, must be based on a preponderance of the evidence. Such damages, if any, may not exceed the sum prayed for in the amended complaint.

Given.....

Refused.....

C. E. Beaumont,
Judge

G. as M. [66]

[Title of District Court and Cause.]

DEFENDANTS' REQUESTED INSTRUCTIONS

Come now the defendants, and submit the following instructions: [67]

Defendant's Instruction No. 1

You are instructed to return a verdict in favor of the defendants.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

R [68]

Defendant's Instruction No. 2

If the jury find from the evidence that the plaintiff herself was careless or negligent at the time and place proximately of the accident, and that such negligence ~~directly~~ contributed to the injury which she sustained, then the plaintiff cannot recover damages in this case and your verdict should be for the defendants.

~~Given~~

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Smith vs. Beasley, 92 Kans. 390; 140 Pac. 892

Udey vs. City of Winfield, 155 Pac. 43 (Kans.)

No objection G [69]

Defendant's Instruction No. 3

I further instruct you that if you find there was a defect in the apparatus used by plaintiff which was the proximate cause of her injuries, and that said defect was within the knowledge of defendants but that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, you will find for the defendants.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Riverside Iron Works vs. Green, 79 Kans. 588;
100 Pac. 482

Morbach vs. Home Mining Co., 53 Kans. 731;
37 Pac. 122

Brown vs. Board of Trustees, 41 Cal. App. 100;
182 Pac. 316

Tartar vs. Mo. K. & T. Co., 241 Pac. 246 (Kans.)

Objected to R [70]

Defendant's Instruction No. 4

I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior
that
to the use of same at the time of her accident and \wedge there was a defect in said apparatus which was the proximate

fall if you find that cause of her ~~injury~~, and [^] plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants upon the question of gross negligence insofar as the erection and placing in position of plaintiff's apparatus is concerned.

Given

Given as modified

Not given

C. E. Beaumont

Judge

Fritchman vs. Chetwood Battery Co., 8 Pac. (2)
368 (Kans.)

Barnes v. Akins, 166 Pac. 474 (Kans.) [71]

Defendant's Instruction No. 5

I further instruct you a contractee owes no duty to an independent contractor, other than to protect the independent contractor from conditions of which the contractee has knowledge and the independent contractor has neither actual nor constructive knowledge. ~~and if you find there was a defect in the apparatus used by plaintiff at the time of her accident and this defect was within the knowledge of defendants, and that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, even if you find such defect was the proximate cause of the injuries complained of you will find for the defendants.~~

~~Given~~

Given as modified

~~Not given~~

C. E. Beaumont

Judge

G as M

Riverside Iron Works vs. Green, 79 Kans. 588;
100 Pac. 482

Morbach vs. Home Mining Co., 53 Kans. 731;
37 Pac. 122

Brown vs. Board of Trustees, 41 Cal. App. 100;
182 Pac. 316

Objected to. [72]

Defendant's Instruction No. 6

If you find that the plaintiff, America Olvera, contracted by written contract to furnish a "specialty act" in her customary manner for the defendant circus, and that the act had been prepared and arranged by plaintiff, and that defendants did not have the right to control the character of said act or the paraphernalia to be used in said act, I instruct you that you must find that plaintiff was acting at the time of the accident as an independent contractor and her employers were acting as contractees.

~~Given~~

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Brosius vs. Orpheum Theatre, 16 Cal. App. (2)

61

R [73]

Defendant's Instruction No. 7

You are instructed that the evidence shown is conclusive that at the time of the accident in question the plaintiff, America Olvera, was performing duties assumed by her under her written contract with the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and no other; that said written contract is free from ambiguities and clear in its terms and the court finds that the relationship created by said written contract is one of "independent contractor" on the part of plaintiff, and "contractee" on the part of the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

~~Given~~

~~Given as modified~~

~~Not given~~✓

C. E. Beaumont

Judge

Batt vs. San Diego Sun Pub. Co. Ltd., 21 Cal.
App. (2) 429; 69 Pac. (2) 216

Pearson vs. Potter Company, 10 Cal. App. 245;
216 Pac. 578

No objection. G. [74]

Defendant's Instruction No. 8

You are instructed that the plaintiff in her contract with Ringling Brothers—Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the

carrying out of her performance, then you shall find in favor of defendants.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Same as 17. R. Covered. [75]

Defendant's Instruction No. 9

You are instructed that the burden of proving her case rests upon the plaintiff, and that in order to recover against the defendants, or either of them, the plaintiff must establish by preponderance of the evidence that said defendants were guilty of gross negligence and that such negligence on the part of the defendant was a direct and proximate cause of the injury to the plaintiff.

Gross negligence is different from and greater than ordinary negligence. Gross negligence has been defined as want of slight diligence, as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of the conscious indifference to consequences.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Goodwin vs. Goodwin, 5 Cal. App. (2), p. 646,
citing Krause vs. Rarity, 210 Cal. 644, at 655

G. [76]

Defendant's Instruction No. 9a

The elemental idea of "negligence" is failure or omission—the failure or omission to do something which should have been done. Negligence that is "gross" involves the additional and affirmative element of intent to do or willfulness with which is done the negligent act. Gross negligence is defined to be the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness.

Given

Given as modified

Not given

C. E. Beaumont

Judge

Seelig vs. First Nat. Bank, D. C. Ill., 20 F. Supp.
61, 68

R. [77]

Defendant's Instruction No. 10

The Court instructs you that it is an admitted fact that the accident in question occurred on the 12th day of September, 1937, at the City of Anthony, State of Kansas, and therefore the law of the State of Kansas will prevail and will be your guide in your deliberation on the issues presented, and the court will further instruct as to the

application of the law of Kansas on the question of negligence and other issues presented.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont
Judge

Restatement of the Law

Conflict of Laws, Secs. 385-386

Loranger vs. Nadeau, 215 Cal. 362; 10 Pac. (2)
63

Keane Wonder Mining Co. vs. Cunningham, 138
C. C. A. 247; 222 Fed. 821

Erie Railroad Co. vs. Tompkins, 304 U. S. 64;
82 Law Ed. 1188; 114 A. L. R. 1487

R. Not necessary. [78]

Defendant's Instruction No. 11

You are instructed that if you find defendants were guilty only of ordinary negligence in relation to the plaintiff in this case and were not guilty of gross negligence towards her, you must find for the defendants in this action.

~~Given~~

~~Given as modified~~

~~Not given~~

C. E. Beaumont
Judge

G. [79]

Defendant's Instruction No. 17

In this case if you believe from the evidence that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which she was engaged at the time of the injury and understood the same, and then chose to engage in the work which exposed her to such perils and danger, she cannot recover
danger and
if her injuries were caused by such a peril, and in determining the question whether or not the plaintiff knew, appreciated and understood the perils and danger of the work in which she was engaged, you will consider the evidence as to plaintiff's age and mentality, and as to her previous experience with a trapeze or similar apparatus, and all other evidence bearing upon said issue.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Parker vs. Witchita, 92 Pac. (2) 86; 150 Kan.
249

Fritchman vs. Chetwood Battery Co., 8 Pac. (2)
368 (Kans.)

Ringling Bros. vs. Olvera, 119 Fed. (2) 584

Corrected instruction 14. G. [80]

Defendant's Instruction No. 19

The court instructs the jury that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporations are entitled to the same fair and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case, the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the case, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant. Your verdict should not be based upon sympathy for or prejudice against any party.

Given

Given as modified

Not given

C. E. Beaumont
Judge

Star Brewing Co. vs. Houck, 222 Ill. 348; 78 N. E.
827

G. as M. [81]

Defendant's Instruction No. 20

If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants, plaintiff continued in her work,

and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Morbach vs. Home Mining Co., 37 Pac. 122
(Kans.)

Walker v. Scott, 67 Kans. 814; 64 Pac. 615

Cheek vs. Eyeth, 89 Pac. (2) 11 (Kans.)

R. What evidence to support? Ignores net. [82]

Defendant's Instruction No. 21

If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full

knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect.

Given

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Morbach vs. Home Mining Co., 37 Pac. 122
(Kans.)

R [83]

Defendant's Instruction No. 22

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one

factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient causes of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

Given

Given as modified

Not given

C. E. Beaumont

Judge

California Jury Instructions (Civil) 61 and 61-a
as adopted for use in the Superior Court of Los
Angeles County, California

G [84]

Defendant's Instruction No. 23

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party to this action was negligent. In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it. Both negli-

gence and proximate cause, as defined in these instructions, are requisites for founding liability.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instructions (Civil) 63 and 62
as adopted for use in the Superior Court of Los
Angeles County, California

G. [85]

Defendant's Instruction No. 24

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence

is equally balanced on the issue of ^{gross} \wedge negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then she has failed to

^{her} fulfill ~~his~~ burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that the cause of the

accident was one not involving ^{gross} \wedge negligence on defend-

ant's part as it is that ^{gross} \wedge negligence on ^{their} ~~his~~ part was a proximate cause, then, because the conflicting probabili-

ties are equal, a case against the defendants has not been established.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instruction (Civil) 73 as adopted
for use in the Superior Court of Los Angeles
County, California

G. [86]

Defendant's Instruction No. 25

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases, as does the danger that reasonably should be apprehended.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instruction (Civil) 58 and 58-A
as adopted for use in the Superior Court of Los
Angeles County, California

G. [87]

Defendant's Instruction No. 26

The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendants were grossly negligent and that such negligence was a proximate cause of injury to the plaintiff.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instruction (Civil) 64 as adopted for use in the Superior Court of Los Angeles County, California.

G. [88]

Defendant's Instruction No. 27

Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former complains.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instruction (Civil) 100 as adopted for use in the Superior Court of Los Angeles County, California

G. [89]

Defendant's Instruction No. 28

In the present action certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you on the witness stand.

Given

~~Given as modified~~

Not given

C. E. Beaumont

Judge

California Jury Instruction (Civil) 15 as adopted
for use in the Superior Court of Los Angeles
County, California

G. [90]

Defendant's Instruction No. 29

You are hereby instructed that the plaintiff, America Olvera, can maintain no action against the defendants for damages sustained, if you find that said damages or injuries were sustained solely through the negligence of a fellow employee or fellow employees.

Given

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Beasley vs. San Jose Fruit Packing Co., 92 Cal.

388

R. [91]

Defendant's Instruction No. 30

You are instructed that an unavoidable accident is one that occurs while all parties are exercising ordinary care, and if you shall find from the evidence that both plaintiff and defendants were exercising ordinary care at the time of the accident, you shall find that the accident was unavoidable and you shall render your verdict in favor of the defendants.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Zaferis vs. Bradley, 28 Cal. App. (2) 188, at 190
G. [92]

Defendant's Instruction No. 31

You are instructed that the plaintiff was working for defendants under and by virtue of the terms and conditions of the contract between the parties hereto executed on September 24, 1936; that the same is a valid, binding and enforceable contract, and you are further instructed that under the terms and conditions thereof the defendants are released from any acts of ordinary negligence on their part in connection with the operation and management of the equipment involved in this accident. If you find that the defendants were not guilty of gross

negligence in the management and operation of the equipment involved in America Olvera's act, you are directed to bring in your verdict for the defendants.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Ringling Bros. vs. Olvera, 119 Fed. (2d) 584

G. [93]

Defendant's Instruction No. 32

Unless you find that the defendants were guilty of wanton and reckless misconduct as distinguished from negligence, you are instructed that the release in the contract of the parties hereto releasing the defendants from liability for negligence, is a full and complete discharge of any and all liability claimed by plaintiff of defendants in this matter. You are further instructed that unless you find the defendants guilty of wanton and reckless misconduct, you will find for the defendants in this case.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Donnelly vs. So. Pac., 118 Pac. (2) 465; 18
Cal. (2) 863

R. [94]

Defendant's Instruction No. 33

"Wilful and wanton misconduct" is such conduct as amounts to an intentional wrong or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety of other persons.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Russell v. Cleveland, etc., 169 Ill. App. 149.

R.

[Endorsed]: Filed Jan. 12, 1944. [95]

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS AND EXCEPTIONS
TO PLAINTIFF'S REQUESTED INSTRUCTIONS.

Come now defendants, jointly and severally, and object and except to the plaintiff's proposed instructions to the jury, upon the following grounds:

I.

Plaintiff's proposed Instruction No. 1 purports to instruct the jury upon the issue of ordinary negligence, which is not before the jury, and fails to include the element of gross negligence, and is confusing, inconsistent and contradictory to other proposed instructions by the plaintiff upon the same subject.

II.

Plaintiff's proposed Instruction No. 2 is defective upon the ground that it does not include all the elements of contributory negligence and is inconsistent with other instructions.

III.

Plaintiff's proposed Instruction No. 3 attempts to define [96] ordinary negligence, which is not in issue, and fails to include the element of gross negligence.

IV.

Plaintiff's proposed Instruction No. 4 is confusing and not a correct statement of the law.

V.

Plaintiff's proposed Instruction No. 11 is not a correct statement of the law, is inconsistent and contradictory to the other requested instructions of the plaintiff, and is confusing and attempts to impair the obligation of contract and eliminates the defense of assumption of risk and of independent contractor; that said instruction is a formula instruction directing a verdict, and does not include all the elements of defense, and further attempts to direct a verdict based upon the contract of employment in evidence without including therein all the elements of the contract.

VI.

Plaintiff's proposed Instruction No. 12 is a formula instruction directing a verdict and must include all of the elements of defense.

VII.

Plaintiff's proposed Instruction No. 13 is confusing and contradictory to other instructions and particularly confuses definitions of gross and ordinary negligence and advises the jury that they may apparently find either gross negligence or ordinary negligence, and is not a correct statement of the law.

VIII.

Plaintiff's proposed Instruction No. 14 is a formula instruction directing a verdict, and does not include all the elements of defense, to-wit, contributory negligence, un-

avoidable accident, assumption of risk, release of damages, etc., and refers to ordinary negligence, confusing the same with gross negligence, contradictory [97] to other instructions and not a correct statement of the law.

IX.

Plaintiff's proposed Instruction No. 15 is a formula instruction directing a verdict, does not contain the elements of defense in issue, and purports to instruct on ordinary negligence, and is confusing and contradictory to other requested instructions.

X.

Plaintiff's proposed Instruction No. 16 in attempting to define the elements of damage for which the plaintiff could recover, is contradictory, inconsistent and confusing, and contains elements of damage not properly and legally recoverable in this action.

COMBS & MURPHINE

By LEE COMBS

Attorneys for defendants

[Endorsed]: Filed Jan. 12, 1944. [98]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled case, find in favor of the plaintiff, America Olvera Pollinger, and against the defendants, Al. G. Barnes Amusement Company, a corporation, and Ringling Bros.-Barnum & Bailey Combined Shows, Inc., a corporation, and assess plaintiff's damages in the sum of Fifty thousand dollars (\$50,000.00).

Dated: Los Angeles, California, January 12, 1944.

William E. Colburn

Foreman of the Jury

[Endorsed]: Filed Jan. 12, 1944. [99]

In the United States District Court in and for the
Southern District of California
Central Division

No. 8367-B

AMERICA OLVERA, also known as
AMERICA OLVERA POLLINGER,

Plaintiffs,

-vs-

AL G. BARNES, INC., a corporation, BARNES &
SELLS FLOTO COMBINED SHOWS, a corporation,
RINGLING BROTHERS, BARNUM &
BAILEY COMBINED SHOWS, INC., a corporation,
Defendants.

JUDGMENT

Be it remembered that this cause came on to be heard before the Honorable Campbell E. Beaumont, Judge Presiding in the United States District Court in the Southern District, Central Division thereof at Los Angeles, California; the plaintiff, America Olvera, sometimes known as America Olvera Pollinger, appeared in person and represented by her attorney, David C. Marcus, Esq., and the defendants, Al G. Barnes Amusement Company, a corporation, and Ringling Brothers, Barnum & Bailey Combined Shows, Inc., represented by their attorneys, Lee Combs, Esq. and Robert E. Corkery, Esq., and the matter having been heard before a Jury duly impanelled to

try said cause and said cause being tried January 4, 5, 6, 7, 11 and 12, 1944, and evidence both oral and documentary having been presented and received by both plaintiff and defendants in the said matter; and the Jury having been instructed by the said Court and the said matter having been submitted to the said Jury; and the Jury having deliberated on the said matter, on the 12th day of January, 1944 did return their verdict in favor of plaintiff, America Olvera Pollinger and against the defendants, Al G. Barnes Amusement Company, a corporation, and Ringling Brothers, Barnum & Bailey Combined Shows, Inc. in the sum of Fifty Thousand (\$50,000.00) Dollars, dama- [100] ges.

Now Therefore It Is the Judgment of This Court that plaintiff America Olvera Pollinger, have judgment against defendants Al G. Barnes Amusement Company, a corporation and Ringling Brothers, Barnum and Bailey Combined Shows, Inc. in the sum of Fifty Thousand (\$50,000.00) Dollars damages together with her costs taxed in the sum of \$

Dated: This 15th day of January, 1944.

C. E. Beaumont

Judge of the United States District Court.

Judgment entered Jan. 15, 1944. Docketed Jan. 15, 1944. C. O. Book 22, Page 787. Edmund L. Smith, Clerk, by R. B. Clifton, Deputy.

[Endorsed]: Filed Jan. 15, 1944. [101]

United States District Court
Southern District of California
Central Division

NOTICE BY CLERK OF ENTRY OF JUDGMENT.

No. 8367-B Civil America Olvera, etc. vs. Al G. Barnes
 Amusement Company, et al.

David C. Marcus, Esq.,
Attorney at Law
415 Spring & Second Bldg.
Los Angeles 13, Calif.

Lee Combs, Esq., and
Robert E. Corkery, Esq.,
Attorneys at Law
925 Pacific Southwest Bldg.,
Los Angeles, Calif.

You are hereby notified that Judgment has been entered this day in the above-entitled case, in Civil Order Book No. 22, page 787.

Dated: Los Angeles, California, January 15, 1944.

EDMUND L. SMITH,
Clerk,

By R. B. Clifton,
Deputy Clerk. [102]

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND JUDGMENT ENTERED IN FAVOR OF PLAINTIFF AND TO ENTER JUDGMENT IN FAVOR OF DEFENDANTS IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT BY DEFENDANTS HERETOFORE MADE AND FOR JUDGMENT NON OBSTANTE VEREDICTO

Come now defendants, by Combs & Murphine, their attorneys, and hereby move the Court to set aside verdict and judgment entered in favor of plaintiff herein and to enter judgment in favor of defendants in accordance with motion for directed verdict by defendants heretofore made and for judgment non obstante veredicto, on the following grounds and for the following reasons:

I.

That the contract sued upon in this case is a contract made under the laws of the State of Florida and contains a clause releasing defendants of any contracting parties from any liability for damages which might have occurred to any participants under the contract, and in this connection further call the Court's attention to the fact that there is no evidence of gross negligence in this case and none has been proven by plaintiff herein, and no facts or circumstances have been shown or proven constituting a release or [103] waiver from the release clause contained in plaintiff's contract, plaintiff's Exhibit No. 1 in this action, and that the same is of binding force and effect upon plaintiff and bars and prohibits her recovery in this action.

II.

Upon the ground that there has been no evidence whatsoever of any kind or nature produced to the effect that Ringling Bros.-Barnum & Bailey Combined Shows, Inc. were the employers or that plaintiff worked for Ringling Bros. at the time the accident in this case occurred, and further that there is no evidence in any way linking or tying up Ringling Bros. to the negligence claimed and alleged in this action by plaintiff herein as having occurred to her on the date of the accident, which occurred at Anthony, Kansas, September 12, 1937, or at all; that there is no evidence whatsoever in this action that Ringling Bros. controlled or regulated the conduct and operation of the Al G. Barnes Show at Anthony, Kansas, on September 12, 1937, or in any manner whatsoever; that there is evidence to the effect that Ringling Bros. and Al G. Barnes are separate corporate entities under separate management and control.

III.

Upon the further grounds that the injuries suffered by the plaintiff in this action were the result, if at all, by the contributory negligence as a matter of law of herself and of her agents, including her husband, Karl Pollinger, in the management, operation, and use of her trapeze equipment.

IV.

That the injury suffered by plaintiff in this action has been conclusively proven and shown to have arisen from the negligence if there was any negligence at all, of fellow servants of plaintiff engaged in the production of an enterprise on behalf of defendant Al G. Barnes Show,

together with the fact that plaintiff was an independent contractor, does not relieve her from the law of Kansas [104] providing that her employer is not liable for injuries occurring to her through the negligent act of her fellow servants.

V.

That the injuries in this matter were the result of a course of action adopted by plaintiff with full knowledge of the nature and character of her act and by her as an experienced, mature person cognizant thereof and of the risks and hazards in connection therewith, and that she assumed all the risks and hazards of her employment. In this connection:

(a) That she assumed the risks and hazards of her employment and her act as a trapeze artist in general;

(b) That if there are any general risks occurring as the result of the operation and management of her equipment by the defendants, she assumed the risk and hazard of such additional risks, if any there were, and knew about them and in that connection she knew about the risks and hazards of falling beyond a net used and employed and held directly under her trapeze for the purpose of catching her in the event she fell, if such were the fact.

(c) That the claim is barred by the statute of limitations.

(d) That the uncontradicted evidence in this case conclusively establishes the absence of any gross negligence or wilful misconduct whatsoever in the case, both as to the operation of the net, which was done in the due course

of the business, and in an approved manner, and in the customary manner and as directed by the plaintiff, and as to the inspection and operation of the trapeze which was likewise done in the same manner.

We respectfully urge the Court that on each and all of the foregoing grounds the Court should set aside the verdict and judgment entered herein in favor of plaintiff and to enter judgment in favor of defendants in accordance with the motion for directed verdict by defendants heretofore made, and for judgment Non Obstante Veredicto.

January 18, 1944.

COMBS & MURPHINE

By Lee Combs

Attorneys for defendants [105]

POINTS AND AUTHORITIES

On motion to have verdict and judgment entered set aside and to have judgment entered in accordance with motion for a directed verdict:

Rules of Civil Procedure for the District Courts
of the United States, Rule 50 (b)

On extension of time for hearing:

Rules of Civil Procedure for the District Courts
of the United States, Rule 6 (b)

On the point that a corporation is not liable for the torts of a subsidiary unless the subsidiary is under the complete management of the principal corporation:

Hollywood Cleaning etc. Co. vs. Hollywood Laundry Service, 217 Cal. 124;

Sherman vs. So. Pac. Co., 98 C. A. D. 550

On the point of legality of the provision in the contract exempting defendant from liability:

Restatement of the Law—Contract Paragraphs 574 and 575

On the fellow servant rule:

Cashin vs. State Highway Commission, 17 Pac. (2) 838 (Kans.)

On assumption of risk:

(a) Implied agreement:

Railway Co. vs. Schroeder, 47 Kans. 315; 27 Pac. 965;

Riverside Iron Works vs. Green, 79 Kans. 588; 100 Pac. 482;

Barnes vs. Akins, 166 Pac. 474 (Kans.)

Ringling Bros. vs. Olvera, 119 Fed. (2) 584

(b) Express agreement:

Atchison T. & S. F. Ry. vs. Bancord, 71 Pac. 253 (Kans.) (71)

[Endorsed]: Filed Jan. 18, 1944. [106]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of California

County of Los Angeles—ss.

Henry Bedford being sworn says: I am and was on the dates herein mentioned over the age of 18 years and not a party to this action; I served the Motion to Set Aside Verdict and Judgment entered in favor of Plaintiff and to Enter Judgment in favor of Defendants in accordance with motion for directed verdict by Defendants heretofore made and for Judgment Non Obstante Veredicto in this action by leaving at the office of David C. Marcus, a true copy thereof; that said service was made on January 18, 1944; that there was no one in the office of David C. Marcus; that after waiting for sometime affiant left said copy on the desk of David C. Marcus.

Henry Bedford

Subscribed and sworn to before me this 21st day of January, 1944.

(Seal)

Jessie Woodruff

Notary Public in and for Said County
and State

[Endorsed]: Filed Jan. 24, 1944. [107]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Come now defendants Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Al G. Barnes Inc., by Combs & Murphine, their attorneys, and move the Court to set aside the verdict returned in the above entitled cause and to grant a new trial therefor; for grounds of said motion the said defendants show to the Court the following, to-wit:

1. The verdict is contrary to the law of the case.
2. The verdict is contrary to the evidence of the case.
3. The verdict is contrary to the law and evidence in the case.
4. There is no evidence whatsoever in the record to support the verdict.
5. The verdict impairs the obligation of contract and the constitutional rights of defendants.
6. The verdict is excessive and unreasonable, and [108] unsupported by the evidence.
7. The verdict is the result of passion, prejudice and bias.
8. The Court misconducted the trial and made remarks prejudicial to defendants to the jury, in the presence of the jury and during the trial and during the argument, and during the reading of the instructions to the jury.
9. Counsel for plaintiff was guilty of misconduct before the jury during the trial and during the argument to the jury, which misconduct influenced and created bias

and prejudice against defendants in the minds of the jury.

10. The Court upon the trial of said cause, admitted improper evidence adduced by the plaintiff.

11. The Court refused to admit proper evidence offered by the defendants.

12. The Court refused to give to the jury the following proper instructions requested by defendants:

“Defendants’ Instruction No. 4

I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and there was a defect in said apparatus which was the proximate cause of her injury, and plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants.”

“Defendants’ Instruction No. 1

You are instructed to return a verdict in favor of the defendants.”

“Defendants’ Instruction No. 3

I further instruct you that if you find there was a defect [109] in the apparatus used by plaintiff which was the proximate cause of her injuries, and that said defect was within the knowledge of defendants but that plaintiff

also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, you will find for the defendants.”

“Defendants’ Instruction No. 6

If you find that the plaintiff, America Olvera, contracted by written contract to furnish a “specialty act” in her customary manner for the defendant circus, and that the act had been prepared and arranged by plaintiff, and that defendants did not have the right to control the character of said act or the paraphernalia to be used in said act, I instruct you that you must find that plaintiff was acting at the time of the accident as an independent contractor and her employers were acting as contractees.”

“Defendants’ Instruction No. 8

You are instructed that the plaintiff in her contract with Ringling Brothers—Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her performance, then you shall find in favor of defendants.”

“Defendants’ Instruction No. 9-a

The elemental idea of “negligence” is failure or omission—the failure or omission to do something which should have been done. Negligence that is “gross” involves the additional and affirmative element of intent to do or willfulness with which is done the negligent act. Gross negligence is defined to be the intentional failure

to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness." [110]

"Defendants' Instruction No. 10

The Court instructs you that it is an admitted fact that the accident in question occurred on the 12th day of September, 1937, at the City of Anthony, State of Kansas, and therefore the law of the State of Kansas will prevail and will be your guide in your deliberation on the issues presented, and the Court will further instruct as to the application of the law of Kansas on the question of gross negligence and other issues presented."

"Defendants' Instruction No. 19

The court instructs the jury that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporations are entitled to the same fair and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case, the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the cases, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant."

"Defendants' Instruction No. 20

If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of in-

spection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants, plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants."

"Defendants' Instruction No. 21

If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity [111] for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect."

“Defendants’ Instruction No. 29

You are hereby instructed that the plaintiff, America Olvera, can maintain no action against the defendants for damages sustained, if you find that said damages or injuries were sustained solely through the negligence of a fellow employee or fellow employees.”

“Defendants’ Instruction No. 32

Unless you find that the defendants were guilty of wanton and reckless misconduct as distinguished from negligence, you are instructed that the release in the contract of the parties hereto releasing the defendants from liability for negligence, is a full and complete discharge of any and all liability claimed by plaintiff of defendants in this matter. You are further instructed that unless you find the defendants guilty of wanton and reckless misconduct, you will find for the defendants in this case.”

“Defendants’ Instruction No. 33

‘Wilful and wanton misconduct’ is such conduct as [112] amounts to an intentional wrong or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety of other persons.”

13. The Court gave erroneous instructions of its own motion on the part of plaintiff, said instructions being the following:

"Plaintiff's Instruction No. 14-A

If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks incident to the act which she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if any there was, either in the erection and placing in position of said trapeze or in the maintenance and [113] operation of said net, was the

proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

"If you further find that the said Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows."

14. The Court changed and altered and modified, and gave as modified and altered, instructions requested by defendants, altering and changing the entire theory of defendants, said instructions being the following which were submitted as follows:

That defendants submitted Defendants' Instruction No. 4 reading as follows:

"I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and there was a defect in said apparatus which was the proximate cause of her injury, and plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants."

That the Court read said instruction to the jury, then instructed the jury to disregard the same, and thereupon read in lieu thereof an instruction drawn up by himself, reading as follows:

"I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and there was a defect in said apparatus which [114] was the proximate cause of her injury, and plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants."

That the Court read only the following language from defendants' Instruction No. 5 as proposed:

"I further instruct you a contractee owes no duty to an independent contractor, other than to protect the independent contractor from conditions of which the contractee has knowledge and the independent contractor has neither actual nor constructive knowledge," omitting to read and refusing to read the following additional language:

"And if you find there was a defect in the apparatus used by plaintiff at the time of her accident and this defect was within the knowledge of defendants, and that

plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, even if you find such defects was the proximate cause of the injuries complained of you will find for the defendants.”

15. That the Court improperly held conferences with counsel for the plaintiff concerning instructions without allowing counsel for the defendants to be present, thus depriving defendants of an opportunity to gain information respecting instructions contemplated as given and therefore prohibiting defendants from meeting the altered situation produced by such course of conduct and the submission of additional instructions to cover the same as particularly appears from the affidavit of Lee Combs filed concurrently herewith.

This motion will be based upon this written notice of motion and upon all the files and records in said action, and the affidavit of Lee Combs filed concurrently herewith.

Dated this 24th day of January, 1944.

COMBS & MURPHINE

By Lee Combs

Attorneys for Defendants

[Endorsed]: Filed Jan. 25, 1944. [115]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of California

County of Los Angeles—ss.

Lee Combs being sworn says: I am and was on the dates herein mentioned, over the age of 18 years; that I am one of the attorneys for defendants in the above entitled action; that I served the Motion for a New Trial and Affidavit in Support of Motion for New Trial, by leaving with Inez Palafox, secretary in charge of the office of David C. Marcus, attorney for plaintiff, a true copy thereof; that said service was made on January 25, 1944.

Further affiant sayeth not.

Lee Combs.

Subscribed and sworn to before me this 25th day of January, 1944.

(Seal)

Jessie Woodruff

Notary Public in and for Said County
and State

[Endorsed]: Filed Jan. 26, 1944. [116]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
NEW TRIAL.

State of California

County of Los Angeles—ss.

Lee Combs being first duly sworn deposes and says: that he is over the age of 21 years; that he is one of the attorneys for defendants in the above entitled matter; that he attended and prosecuted the entire matter to completion in the trial court as such attorney.

That at the outset of this proceeding affiant submitted as a portion of Defendants' Instructions, certain instructions on the subject of master and servant, copies of which are attached hereto marked Exhibit "A" and made a part hereof as if set forth verbatim herein, being six in number; that the Court examined the same and on or about the 5th day of January, 1944, the Court informed affiant that since the case was being tried on the theory of independent contractor said instructions were unnecessary, and requested that affiant withdraw the same, upon which said statement affiant did withdraw said [117] instructions; that thereafter and during the course of the trial, the Court consulted privately in Chambers with David C. Marcus, attorney for plaintiff in the above entitled matter, and affiant is informed and believes and on said ground alleges discussed at said private meetings instructions submitted by the parties to this action; that affiant was not called in nor was any of the counsel for defendants called in at said consultations at which instructions were discussed; that thereafter the Court of

its own motion, prepared several instructions and suggested instructions to be submitted on behalf of the plaintiff; that some of said instructions were abandoned but that the Court in particular prepared and submitted and read to the jury plaintiff's Instruction 14-a, the wording of which particularly appears from the records and files in the above entitled matter and made a part of the Motion for New Trial.

That in addition thereto during the course of the trial on one or more occasions the Court, as appears from the records, when the subject of the net was involved and evidence was being taken thereon from witnesses, commented to the effect that "this appears to be an important part of the case"; that upon the submission of the case to the jury the Court read instructions which in effect gave the case to the jury on the subject of ordinary negligence in relation to the operation and management of the net, and segregated the net from the trapeze operation; that prior thereto and during the argument made by plaintiff's counsel in the above entitled action reference was made to the defendants as wealthy corporations, exploiting the plaintiff as a performer; that objection to said argument was made by affiant and the court sustained said objection and instructed the jury to disregard the same; that thereafter plaintiff's attorney continued to argue in like vein and when thus prejudicing and influencing the jury against defendants intimated other things and plaintiff closed his argument with the statement "we have had to fight mighty hard for this judgment. Give this woman all she asks for." [118]

That the Court stopped affiant when affiant was informing the jury of the law relating to matters con-

cerning this case as he expected the Court to give it; that this constituted prejudicial conduct as to defendants' cause.

That the Court in holding private conferences concerning instructions with opposing counsel, left counsel for defendants uninformed of his intention regarding instructions, both as to the submission of plaintiff's Instruction 14-a and in relation to the correction and alteration and change of defendants' instruction.

That the change in these instructions and the rejection of certain instructions submitted on behalf of the defendants, which rejection counsel for defendants were first informed of upon the reading of the instructions to the jury, prohibited defendants' counsel from re-submitting instructions to the jury on the master and servant doctrine; that affiant is informed and believes that the jury found against the defendants on the theory that the contract had been abrogated and waived and the release therefor abrogated and waived by virtue of defendants supplying plaintiff with the net and operating same themselves and decided the case on ordinary negligence and against defendants on that question; that the course and conduct of the Court as indicated was one of bias and prejudice and said course, consistently carried out, developed and created in the mind of the jury a prejudice against defendants with the result that the verdict rendered in the above entitled matter was the result of passion, prejudice and influence.

Wherefore, affiant prays that a new trial be granted and for such other and further relief as is meet and proper.

Lee Combs

Subscribed and sworn to before me this 24th day of January, 1944.

(Seal)

Jessie Woodruff

Notary Public in and for said County
and State [119]

EXHIBIT "A"

"Defendants' Instruction No. 12

The Court instructs the jury if you find defendants' servants who were acting with the plaintiff at or just before the time of her injury, either in arranging the rigging or apparatus known as a trapeze, or in holding a net for the purpose of catching an operator in an accidental fall from a trapeze, were directly cooperating with the plaintiff and with each other in the particular business in hand, to-wit, a circus exhibition or performance, and that the duties of such servants and the plaintiff brought them into habitual association for the purpose of said circus exhibition or performance and at the time of the injury or immediately prior thereto they were directly cooperating with each other in promoting a circus exhibition or performance, and if you believe from the evidence that the plaintiff, America Olvera, and the men assisting her at the time of the alleged injury were all in the employ of the defendants, then the court instructs the jury that under the law of the State of Kansas, where the injury complained of occurred, the said plaintiff America Olvera and the said rigging men and net holders, were fellow servants and if the jury further believes from the evidence that the injury received by plaintiff was occasioned by her own carelessness and negligence

or through the carelessness and negligence of her fellow servants, then under the law of Kansas defendant would not be liable to the plaintiff if said defendants were otherwise without fault."

"Defendants' Instruction No. 13

The court instructs the jury that no person or corporation is responsible for injuries to an employee occasioned by the negligence or unskillfulness of a fellow servant engaged in the same line of service, provided the employer has taken proper care and caution to engage proper servants to perform the duties assigned to them, nor is the employer liable for injuries thus sustained if the person injured was, while engaged as such servant, acquainted with the character of such fellow servant for capacity, prudence and skill." [120]

"Defendants' Instruction No. 14

The jury are instructed as a matter of law in the State of Kansas that a servant when she enters the service of an employer impliedly agrees that she will assume all risks which are ordinarily and naturally incident to the particular service in which she engaged, and if the jury believe from the evidence that the injury to the plaintiff was only the result of one of the risks ordinarily incident to the work in which she was engaged and not otherwise, then she cannot recover in this case and your verdict should be for the defendants."

"Defendants' Instruction No. 15

The jury are instructed that a servant when she engaged in a particular employment, is presumed to do so with a knowledge of and a taking of the risks of its ordi-

nary hazards, whether from the carelessness of fellow servants in the same line of employment or from defects in the apparatus or appliances used in the business or in the ordinary dangers in the use of the same.”

“Defendants’ Instruction No. 16

The jury are instructed that where an employment is attended with danger, a servant engaging in it assumes the hazards of the ordinary perils which are incident to it, and if she receives an injury from an accident which is an ordinary peril of the service undertaken by her, she cannot recover damages for such injury.”

“Defendants’ Instruction No. 18

You are instructed if you find that any negligence which was the proximate cause of the injury to plaintiff was caused by the act of a foreman in the employ of the defendants, who was in charge of and directing other employees and servants engaged in working with the plaintiff to the common purpose of providing a trapeze act for defendant circus, and such foreman while directing was working with such other employees, you will find that such foreman was also a fellow servant of the plaintiff and as the fellow servant rule is in [121] full force and effect in the State of Kansas the employer is not liable to those engaged in his employment for injuries suffered by them as a result of the negligence, carelessness or misconduct of other servants of the same employer engaged in the same common employment.”

[Endorsed]: Filed Jan. 25, 1944. [122]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between respective counsels: That plaintiff may have up to and including February 25th, 1944 to file counter affidavits in the above matter.

Dated: This 3rd day of February, 1944.

David C. Marcus

Attorney for Plaintiff

COMBS & MURPHINE

By Lee Combs

Attorney for Defendants.

It Is So Ordered.

C. E. Beaumont

Judge of the U. S. District Court

[Endorsed]: Filed Feb. 25, 1944. [123]

[Title of District Court and Cause.]

AFFIDAVIT

State of California

County of Los Angeles—ss.

David C. Marcus, being first duly sworn deposes and says:

That he is the attorney for the plaintiff in the above entitled matter and during all stages of the proceedings has been and now is her attorney. Plaintiff's complaint and defendants' answer, thereto are predicated upon the contractual relationship of the plaintiff and defendants which contract was introduced in evidence and established the theory of both plaintiff and defendants' case, viz: that the relationship existing between the parties to the action was that of Independent Contractor and Contractee. There is not now nor has there ever been an issue in this case involving master and servant or fellow servant doctrine. During the trial of said matter both plaintiff and defendants' counsel were in conference with the court respecting the proposed instructions and plaintiff's counsel advised [124] defendants' counsel that certain of his proposed instructions dealing with the master and servant and the fellow servant doctrine were inapplicable to his theory of the case and the issues framed. Whereupon defendants' counsel stated that such was the fact and voluntarily and of his own motion requested the Court to withdraw and not to consider or give any and all his instructions dealing with the fellow servant and master *servant* doctrine. That said instructions are not and have never been a part of the record or files or requested in-

structions by the defendants. That it is not true that the Court consulted privately with David C. Marcus, attorney for the plaintiff and discussed with him at said private meeting, instructions submitted to the parties to this action. That at a conference held in the Court's Chambers on January 8, 1944, attended by both plaintiff and defendants' counsel, the proposed instructions of plaintiff and defendants were discussed by the Court and counsel for both plaintiff and defendants. At said time plaintiff's instruction Number 14 had been submitted and discussed by counsel for plaintiff and defendants and the Court. At that time the Court stated to respective counsel that it did not intend to give plaintiff's instruction Number 14 in the form offered but would correct, modify and give same as plaintiff's instruction and number 14-A which your affiant requested the Court so to do. It is not true that on one or more occasions the Court when the subject of a net was involved commented to the effect that "This appears to be an important part of the case" but alleges the true fact to be that plaintiff's counsel had on preliminary questions asked of a witness questions which tended to be leading, which questions were objected to by defendants and objection sustained. When the vital issues of the case were reached at the request of defendants' counsel, the Court admonished plaintiff's counsel to refrain from asking leading questions as we were reaching the vital issues and appears to be the important part of the case. It is not true that the Court read any instructions which in effect gave the case to the jury on the subject [125] of ordinary negligence in relation to the operation and management of the net and segregated the net from the trapeze operation. It is not

true that Court held private conferences concerning instructions with plaintiff's counsel but that at the meeting held in the Court's Chambers as before mentioned on January 8, 1944, attended by both counsel for plaintiff and defendants all proposed instructions were discussed, corrected and modified and the Court indicated in what particular he intended to correct, modify and give as plaintiff's, defendants' and its own instructions. The defendants and plaintiff were both cognizant what instructions the Court intended to give on behalf of both parties and on its own motion and neither party was stopped in argument to the jury on the said instructions as the Court intended to give.

Wherefore your affiant prays that the motion for a new trial be denied.

Dated: This 21st day of February, 1944.

DAVID C. MARCUS
Attorney for Plaintiff

Subscribed and sworn to before me this 21st day of February, 1944.

(Seal)

J. B. MANDEL

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Feb. 25, 1944. [126]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between respective counsel: That the motion for new trial in the above entitled matter will be heard on the 6th day of March, 1944, at the hour of 2 P. M. before the above entitled Court.

March

Dated: This 1st day of ~~February~~, 1944.

David C. Marcus

Attorney for Plaintiff.

Lee Combs

Attorney for Defendants.

It is so ordered. Mar. 6 - 1944.

Judge

[Endorsed]: Filed Mar. 6, 1944. [127]

At a stated term, to-wit: The February Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday the 7th day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable C. E. Beaumont, District Judge.

No. 8367-B Law

America Olvera Pollinger,

Plaintiff,

v.

Al G. Barnes Amusement Co., a corp., et al.,

Defendants.

This cause coming on for (1) further hearing motion of defendants, filed January 18, 1944, to set aside verdict and judgment entered in favor of plaintiff, and to enter judgment in favor of defendants in accordance with motion for directed verdict by defendants heretofore made and for judgment non obstante veredicto, pursuant to stipulation filed March 6, 1944; and (2) further hearing motion of defendants, filed January 25, 1944, for new trial, pursuant to stipulation filed March 6, 1944; David Marcus, Esq., appearing as counsel for the plaintiff; Lee Combs and Robert E. Corkery, Esqs., appearing as counsel for the defendants; and H. A. Dewing, Court Reporter, being present and reporting the proceedings;

Attorney Combs continues argument. At 11:20 A. M. court recesses. At 11:35 A. M. court reconvenes. Attorney Marcus argues. At 12:53 P. M. Attorney Combs argues further. At 1:12 P. M. the Court denies (1) motion to set aside verdict, etc., and orders that (2) motion for a new trial stand submitted. [128]

At a stated term, to-wit: The February Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday the 30th day of June, in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable C. E. Beaumont, District Judge.

No. 8367-B Law

America Olvera Pollinger,

Plaintiff,

v.

Al. G. Barnes Amusement Company, a corporation, et al.,
Defendants.

This cause coming on for decision on motion for a new trial; David Marcus, Esq., appearing as counsel for the plaintiff; Lee Combs, Esq., appearing as counsel for the defendants; and H. A. Dewing, Court Reporter, being present and reporting the proceedings:

Defendants' motion for a new trial having heretofore been heard by the Court, and counsel having argued the same, and the Court having duly considered the same and being fully advised as to the facts and the law, now reads opinion and denied said motion. [129]

[Title of District Court and Cause.]

NOTICE.

To America Olvera, also known as America Pollinger,
plaintiff, and to David C. Marcus, her attorney:

You, and Each of You, will please take notice that the undersigned has filed a stay bond on execution in the above entitled matter in the amount of \$62,500.00. You will therefore govern yourselves accordingly.

Dated this 3rd day of August, 1944.

COMBS & MURPHINE

By Lee Combs

Attorneys for Defendants

[Endorsed]: Filed Aug. 3, 1944. [130]

[Title of District Court and Cause.]

STIPULATION.

It Is Hereby Stipulated by and between Lee Combs, attorney for defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and David C. Marcus, attorney for plaintiff, that the bond for supersedeas and cost bond on appeal as to Ringling Bros.-Barnum & Bailey Combined Shows, Inc., may be fixed at the sum of \$62,500.00 and that said bond may serve both as cost and stay bond.

Dated this 3 day of August, 1944.

COMBS & MURPHINE
LEE COMBS

By Lee Combs
Attorney for Defendants

David C. Marcus
Attorney for Plaintiff

[Endorsed]: Filed Aug. 3, 1944. [131]

[Title of District Court and Cause.]

ORDER FOR SUPERSEDEAS AND COST BOND
ON APPEAL.

A judgment for the sum of \$50,000.00 in favor of the plaintiff and against defendants having been entered in the office of the Clerk of this court on the 15th day of January, 1944, and an appeal having been allowed;

Now, on motion of Combs & Murphine and Lee Combs, attorneys for defendants, it is ordered that execution and all proceedings in this suit be stayed as to defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., pending hearing and determination of the said appeal and the coming down to this court of the mandate of the Circuit Court of Appeals, for the Ninth Circuit, upon filing by the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. of a supersedeas bond for \$62,500.00 approved by the Judge of this Court.

It is further ordered that said bond in the sum of \$62,500.00 if filed and approved, shall serve and suffice as both a supersedeas and a cost bond.

Dated this 3rd day of August, 1944.

C. E. BEAUMONT
Judge

[Endorsed]: Filed Aug. 3, 1944. [132]

[Title of District Court and Cause.]

BOND ON APPEAL TO STAY EXECUTION.

Know All Men By These Presents, that we, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., Defendant in the above entitled action, as Principal, and United States Guarantee Company, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, as Surety, are held and firmly bound unto America Olvera, also known as America Pollinger, Plaintiff, in the sum of Sixty-two Thousand Five Hundred (\$62,500.00) Dollars, lawful money of the United States of America, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that

Whereas, the above named defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., has appealed, or is about to appeal to the United States Circuit Court of Appeals for the Ninth *District*, from the judgment entered in favor of the plaintiff, and against the Defendant, in the above entitled Court and in the above entitled action, on or about the 15th day of January, 1944, for the sum of \$50,000.00 Judgment and \$..... costs of suit, and \$..... interest.

Now, Therefore, in consideration of said appeal and stay of execution and of the premises, if the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. shall prosecute its writ on [133] appeal to effect, and shall satisfy the judgment in full together with costs,

interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed against defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and shall satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award against Ringling Bros.-Barnum & Bailey Combined Shows, Inc., defendant, then this obligation shall be void; otherwise, to remain in full force and effect.

Said Surety does hereby consent that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation, and award execution thereon.

In Witness Whereof, the corporate seal and name of the said Principal is hereto affixed and attested by its duly authorized officer and the corporate seal and name of the said surety is hereto affixed and attested by its duly authorized officer at Los Angeles, California, this 31st day of July, 1944.

(Seal) Ringling Brothers Barnum & Bailey
Combined Shows Inc
By W. P. Dunn Jr. Treas
Principal

(Seal) United States Guarantee Company
By Esther M. Daniels
Attorney-in-Fact
And Delorus E. Clark
Attorney-in-Fact

State of California

County of Los Angeles—ss.

On this 31st day of July, A. D. 1944, before me, M. S. Banks, a Notary Public in and for the said County and State, personally appeared Esther M. Daniels and Delorus E. Clark, known to me to be the persons whose names are subscribed to the within Instrument, as the Attorneys-in-Fact of United States Guarantee Company and acknowledged to me that they and each of them subscribed the name of United States Guarantee Company thereto as principal and their own names as Attorneys-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal)

M. S. BANKS

Notary Public in and for said County and State

My commission Expires Feb. 2, 1947.

Examined and recommended for approval as provided in Rule 13.

Lee Combs

Attorney

I hereby approve the foregoing this 3rd day of August, 1944.

C. E. Beaumont

District Judge [134]

State of New York

County of New York—ss.

On the 24th day of July, 1944, before me Helen E. Fitzgerald, a notary public, in and for said county and state, residing therein, duly commissioned and sworn. personally appeared W. P. Dunn, Jr. known to me to be the Treasurer of Ringling Bros.-Barnum & Bailey Combined Shows, Inc., the corporation that executed the within instrument, and acknowledged to me that he subscribed the name of Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and his own name as such officer thereto.

Helen E. Fitzgerald

(Affix seal here)

Notary Public

My Commission expires

Helen E. Fitzgerald

Notary Public, New York County

N. Y. Co. Clk's No. 315, Reg. No. 418F5

(Seal)

Certificates filed in

Bronx Co. Clk's No. 36, Reg. No. 162-F-5

Queens Co. Reg. No. 155-F-5

Westchester County

Commission expires March 30, 1945

State of New York

County of New York—ss

No. 7188

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, the same being a Court of Record having by law a seal, Do Hereby Certify, That Helen E. Fitzgerald whose name is subscribed to the annexed deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for said County, duly commissioned and sworn and qualified to act as such and authorized by the laws of the State of New York to protest notes, to take and certify depositions, to administer oaths and affirmations and certify the acknowledgment or proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this State. And further, that I am well acquainted with the handwriting of such Notary Public, or have compared the signature of such officer with *his* autograph signature filed in my office, and believe that the signature to the said annexed instrument is genuine.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 25 day of July, 1944.

(Seal)

ARCHIBALD R. WATSON

County Clerk and Clerk of the Supreme Court,
New York County [135]

State of

County of

—ss.:

On this 31st day of July, 1944, before me personally came Esther M. Daniels to me known and by me known to be an Attorney-in-Fact of the United States Guarantee Company, the corporation described in and which

executed the annexed bond on behalf of Ringling Bros. Barnum & Bailey Combined Shows, Inc. and the said Esther M. Daniels being by me duly sworn, did depose and say that *he* resides in the City of Los Angeles in the State of California; that *he* is an Attorney-in-Fact of said United States Guarantee Company, and knows the corporate seal thereof; that the seal affixed to said annexed instrument is such corporate seal, and was thereto affixed by authority of the Power of Attorney of said Company, of which a certified copy is hereto attached, and that *he* signed said annexed instrument as an Attorney-in-Fact of said Company by like authority; and that *he* is acquainted with Delorus E. Clark and knows *him* to be also an Attorney-in-Fact of said Company and that the signature of said Delorus E. Clark subscribed to said annexed instrument is in the genuine handwriting of said Delorus E. Clark and was thereto subscribed by like authority and in deponent's presence; that the assets of said Company, unencumbered and liable to execution, exceed its debts, claims and liabilities of every nature by more than the sum of three million dollars, and that *he* believes the attached statement of said Company's assets and liabilities, signed by deponent, is true and correct.

ESTHER M. DANIELS
Deponent's Signature

Subscribed, Acknowledged and Sworn to before me on the date above written.

M. S. BANKS,
Notary Public

(Officer's Signature, Description and Seal)

My Commission Expires Feb. 2, 1947.

(Certified Copy Power of Attorney, authorizing
execution of Bonds.)

Power of Attorney

Know All Men by These Presents, that the United States Guarantee Company of New York City, New York, a corporation of the State of New York, has constituted and appointed, and does hereby constitute and appoint R. G. Hillman, R. H. Hillman, M. S. Banks, S. E. Nutt, Jared C. Aiken, A. J. Eggenberger, Walter H. Duff, Esther M. Daniels, C. J. Hoekstra, Mary L. Branch and Delorus E. Clark of Los Angeles, California, and Charles Seeley and Edmund T. King of San Francisco, California, each its true and lawful Attorney-in-Fact to execute jointly with each of the others, under such designation in this Company's name and to affix its corporate seal to and deliver for and on its behalf, as surety thereon or otherwise, bonds or obligations of either of the following classes, to wit:

1. Bonds or obligations required on bids or proposals made by any bidder, or to secure the performance of contracts made by any contractor, for furnishing supplies to, or for furnishing labor and materials and performing any work for, the United States of America, or any State, City, Town, Village, Board, or others, or to secure payment for any such labor or materials, or the fulfillment of any guarantees for maintenance thereof, and consents to

modifications or alteration of bids, proposals or contracts the performance of which has been guaranteed under such bonds or obligations;

2. Bonds to the United States of America which are required or permitted under laws or regulations relating to the Customs or Internal Revenue;
3. Bonds for Notaries Public within the State of California and bonds required by the laws, ordinances or regulations of any State, City, Town, Village, Board or other body or organization, public or private, for obtaining a License or Permit for exercising any privilege or doing or carrying on any work, business or occupation;
4. Bonds to Transportation Companies to secure payment of transportation charges, or for delivery of freight prior to surrender of Bill of Lading;
5. Bonds and undertakings (except bonds on behalf of fiduciaries) required or permitted by law to be given or filed in any suit, matter or proceeding in any Court of the United States, or in any State or other court, or given to or filed with any Sheriff or Magistrate within any State, for the doing or not doing of anything specified in such Bond or Undertaking, in which the penalty of the bond or liability incurred under such undertaking does not exceed one hundred thousand dollars (\$100,000);

6. Any other bond or undertaking, the execution of which shall be authorized by letter addressed to either of said Attorneys-in-Fact, signed by George H. Reaney, President, or John T. Jones or William E. Schenck or James G. Cannon or Nathan Mobley or Edward E. Stalling, Vice-Presidents of this Company, and sealed with this Company's corporate seal, attested by its Secretary or one of its Assistant Secretaries;

—and the execution of any and all such bonds and undertakings by any two of such Attorneys-in-Fact, in this Company's name and on its behalf as surety thereon or otherwise, under its corporate seal, in pursuance of the authority hereby conferred shall, upon delivery thereof, be valid and binding upon this Company.

In Witness Whereof, the said United States Guarantee Company has, pursuant to its By-Laws, caused these presents to be signed by its Vice-President and Assistant Secretary and its corporate seal to be hereto affixed this 8th day of April, 1940.

UNITED STATES GUARANTEE COMPANY

By

James G. Cannon
Vice-President

Ward E. Flaxington,
Assistant Secretary [Corp. Seal] [136]

State of New York

County of New York—ss.

On this 8th day of April, 1940, before me personally came Ward E. Flaxington to me known and by me known to be Assistant Secretary of the United States Guarantee Company, the corporation described in and which executed the foregoing Power of Attorney to R. G. Hillman, R. H. Hillman, M. S. Banks, S. E. Nutt, Jared C. Aiken, A. J. Eggenberger, Walter H. Duff, Esther M. Daniels, C. J. Hoekstra, Mary L. Branch, Delorus E. Clark, Charles Seeley and Edmund T. King and the said Ward E. Flaxington being by me duly sworn did depose and say that he resides in the City of New York, in the State of New York; that he is Assistant Secretary of the United States Guarantee Company and knows the corporate seal thereof; that the seal affixed to the foregoing Power of Attorney is such corporate seal and was thereto affixed by authority of the By-Laws of said Company, and that he signed said Power of Attorney as Assistant Secretary of said Company by like authority; that he is acquainted with James G. Cannon and knows him to be Vice-President of said Company and that the signature of said James G. Cannon subscribed to said Power of Attorney is in the genuine handwriting of said James G. Cannon and was thereto subscribed by authority of said by-laws and in deponent's presence.

WARD E. FLAXINGTON.

Subscribed, Acknowledged and Sworn to before me on the date above written.

[Notarial Seal]

DAVID OSSMAN

Notary Public, Queens Co. No. 3421

Commission Filed in New York Co. No. 249

Commission expires March 30, 1941

City and County of New York: ss.

I, George J. Zwier, Assistant Secretary of the United States Guarantee Company, do hereby certify that the following is a true excerpt from the By-Laws of said Company as adopted by its Board of Directors on February 6, 1929, and that the same has not since been amended or rescinded, to-wit:

“Article VII. Execution of Bonds, etc.

Sec. 1. All bonds, undertakings, contracts, powers of attorney and other instruments for and on behalf of the Company which it is authorized by law or its charter to execute, may and shall be executed in the name and on behalf of the Company by its President, or a Vice-President, jointly with its Secretary, or an Assistant Secretary, under their respective designations, except that:

(a) any officer or officers, agent or agents, attorney-in-fact or attorneys-in-fact designated in any resolution of the Board of Directors or Executive Committee adopted either before or after the making of this By-Law, or in any power of attorney executed as provided for in this section, may execute in the manner prescribed in such resolution or power

of attorney any such bond, undertaking or other obligation which he or they shall be empowered to execute by such resolution or power of attorney:"

And I further certify that I have compared the foregoing copy of the Power of Attorney with the original thereof executed by said United State Guarantee Company to R. G. Hillman, et al., dated April 8th, 1940, and the same is a correct and true copy of the whole of said original Power of Attorney and that said Power of Attorney has not been revoked.

And I further certify that said United States Guarantee Company is duly licensed to transact fidelity and surety business in the State of California and is also duly licensed to become sole surety on bonds, undertakings, etc., permitted or required by the laws of the United States.

Given under my hand and the seal of said Company at New York City, N. Y., this 31st day of July, 1944.

George J. Zwier
Assistant Secretary

[Endorsed]: Filed Aug. 3, 1944. [137]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To America Olvera, also known as America Pollinger, plaintiff, and to David C. Marcus, her attorney; to Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., defendant, and to Combs & Murphine, George P. Kinkle, John S. Hunt and Lee Combs, its attorneys:

Notice Is Hereby Given that Ringling Bros.-Barnum & Bailey Combined Shows, Inc., defendant in the above entitled cause, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from the final judgment entered in the above entitled action on January 15th, 1944.

Dated this 4th day of August, 1944.

COMBS & MURPHINE
GEORGE P. KINKLE
JOHN S. HUNT
LEE COMBS

By Lee Combs

Attorneys for defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

Mailed copy to David C. Marcus, atty. for plf. and to Combs & Murphine, George P. Kinkle, John S. Hunt and Lee Combs, attys. for defts.

[Endorsed]: Filed Aug. 14, 1944. [138]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To America Olvera, also known as America Pollinger, plaintiff, and to David C. Marcus, her attorney; to Ringling Bros.-Barnum & Bailey Combined Shows, Inc., defendant, and to Combs & Murphine, George P. Kinkle, John S. Hunt and Lee Combs, its attorneys:

Notice Is Hereby Given That Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., a corporation, defendant in the above entitled cause, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from the final judgment entered in the above entitled action on January 15, 1944.

Dated this 4th day of August, 1944.

COMBS & MURPHINE
GEORGE P. KINKLE
JOHN S. HUNT
LEE COMBS

By Lee Combs

Attorneys for defendant Al G. Barnes Amusement Company, sued herein as Al G. Barnes Inc.

Mailed copy to David C. Marcus, atty. for plf; and to Combs & Murphine, George P. Kinkle, John S. Hunt and Lee Combs, attys. for defts.

[Endorsed]: Filed Aug. 14, 1944. [139]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that United States Guarantee Company, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, and duly licensed to transact business in the State of California, is held and firmly bound unto America Olvera, also known as America Pollinger, plaintiff and respondent in the above entitled case, in the penal sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to said plaintiff and respondent, her successors, assigns or legal representatives, for which payment well and truly to be made, United States Guarantee Company, a corporation, binds itself, its successors and assigns firmly by these presents.

The condition of the above obligation is such, that whereas, Al G. Barnes Amusement Company, a corporation, sued herein as Al G Barnes, Inc., a corporation, one of the defendants and appellants in the above entitled action, is about to take an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment made and entered on or about the 15th day of January, 1944, in favor of the plaintiff and respondent by the United States District Court for the Southern District of California, Central Division, in the above entitled case.

Now, Therefore, if the above named appellant shall prosecute said appeal to effect and answer all costs which

may be adjudged [140] against it if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It is hereby agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 1st day of August, 1944.

UNITED STATES GUARANTEE COMPANY

By Jared C. Aiken

Attorney in Fact

And Esther M. Daniels

Attorney in Fact (Seal)

State of California

County of Los Angeles—ss.

On This 31st day of July, A. D. 1944, before me, M. S. Banks, a Notary Public in and for the said County and State, personally appeared Esther M. Daniels and *Delorus E. Clark*, known to me to be the persons whose names are subscribed to the within Instrument, as the Attorneys-in-Fact of United States Guarantee Company and acknowledged to me that they had each of them sub-

scribed the name of United States Guarantee Company thereto as principal and their own names *at* Attorneys-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal)

M. S. BANKS

Notary Public in and for said County and State.

My Commission Expires Feb. 2, 1947.

Examined and recommended for approval as provided in Rule 13.

Lee Combs

Attorney

I hereby approve the foregoing this day of August, 1944.

.....

Judge

[Endorsed]: Filed Aug. 14, 1944. [141]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and on behalf of the respective parties to the above entitled cause, that all the original papers and exhibits in the above entitled matter should be inspected by the Appellate Court and sent to the Appellate Court in lieu of copies, and that the District Court may make such order therefor and for the safe keeping, transportation and return thereof, as it deems proper.

The exhibits necessary to be so transmitted are plaintiff's Exhibits Nos. 1, 2, 3, 4, 5 and 6, and defendants' Exhibits "A," "B."

Dated this 31 day of August, 1944.

David C. Marcus

Attorney for Plaintiff

COMBS & MURPHINE

GEORGE P. KINKLE

JOHN S. HUNT

LEE COMBS

By Lee Combs

Attorneys for Defendants [142]

ORDER

On the annexed stipulation and on motion of Combs & Murphine, George P. Kinkle, John S. Hunt and Lee Combs, attorneys for appellants;

It Is Ordered that plaintiff's Exhibits Nos. 1, 2, 3, [J.F.T. O'Connor, Judge] and "B" 4, 5 and 6, and defendants' Exhibit "A" ^ be sent to the Appellate Court in the above entitled matter to be inspected by it in lieu of copies thereof, and that the Clerk of the District Court is hereby designated and ordered to attend to the safe-keeping, transportation and return thereof to this court after the disposition of this matter on appeal.

Dated this 30 day of Aug., 1944.

J. F. T. O'Connor
Judge

[Endorsed]: Filed Aug. 30, 1944. [143]

[Title of District Court and Cause.]

DEFENDANTS' RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC. and AL G. BARNES AMUSEMENT COMPANY, a corporation, sued herein as Al G. Barnes Inc., DESIGNATION OF DOCUMENTS, RECORDS AND PROCEEDINGS TO BE INCLUDED IN RECORD ON APPEAL, INCLUDING REPORTER'S TRANSCRIPT.

Come now the defendants Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., and designate the following documents, records and proceedings and portions of the record which they believe necessary to a proper determination of the above entitled case on appeal, including the reporter's transcript of the testimony received during the trial:

1. The following exhibits marked in evidence: Plaintiff's Exhibits 1, 2, 3, 4, 5 and 6; Defendants' Exhibits A, B.
2. The amended complaint.
3. The motion of Al G. Barnes Amusement Company to dismiss.
4. Memoranda of order signed by Judge Cosgrave respecting said motion to dismiss.
5. The verified answer of defendant Al G. Barnes Amusement Company. [144]
6. Order concerning the filing of a verified answer by Al G. Barnes Amusement Company.
7. The separate answer of defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

8. The amendment to the answer of Al G. Barnes Amusement Company filed January 18, 1940.

9. Amendment to answer of defendants filed January 6, 1944.

10. The order under Rule 16, Rules of Civil Procedure, signed by Judge Neterer.

11. Motion for directed verdict filed by defendants Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Al G. Barnes Amusement Company.

12. The verdict of the jury.

13. The judgment of the Court after verdict.

14. The Court's instructions (a), (b), (c), and 14-a.

15. Plaintiff's instructions 4, 5, 6, 7, 8, 9, 10, 14, 14-a and 16.

16. Defendants' instructions, together with all notations of the Court thereon, 1, 2, 3, 4, 5, 6, 7, 8, 9, 9-a, 10, 11, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33.

17. Any and all other instructions proposed or filed in the above entitled matter, comprising all of the instructions requested and filed in said matter by the parties hereto.

18. Defendants' objections and exceptions to plaintiff's requested instructions.

19. Memo order re directed verdict, January 11, 1944.

20. Notice of entry of judgment.

21. Motion to set aside verdict and judgment entered in favor of plaintiff and to enter judgment in favor of defendants, in accordance with motion for directed verdict by defendants heretofore made and for judgment non obstante veredicto, and authorities thereto attached. [145]

22. Affidavit of service of motion to set aside verdict and judgment entered in favor of plaintiff, etc.

23. Motion for new trial.

24. Affidavit of service of motion for new trial and affidavit in support of motion for new trial.

25. Affidavit of Lee Combs in support of motion for new trial.

26. Stipulation concerning counter-affidavits re new trial.

27. Affidavit of David C. Marcus in connection with motion for new trial.

28. Stipulation re hearing motion for new trial.

29. Order concerning motions for new trial and for judgment non obstante veredicto.

30. Order re motion for new trial.

31. Notice concerning the filing of stay bond on execution and appeal bond.

32. Order for supersedeas and cost bond on appeal.

33. Stipulation concerning cost and stay bond on appeal.

34. Stay bond and cost bond of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. in the sum of \$62,500.00, including order of court approving same.

35. Undertaking for costs on appeal filed by Al G. Barnes Amusement Company, including order of court approving same.

36. Notice of appeal of Al G. Barnes Amusement Company.

37. Notice of appeal of Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

38. Stipulation and order thereon providing for transmission of exhibits without copying, under Rule 75-I.

39. This designation of documents, records and proceedings to be included in record on appeal, including reporter's transcript.

40. The entire reporter's transcript of the testimony and [146] proceedings before the trial court, including the exhibits introduced in evidence and transcribed therein and including the objection to the introduction of proof made at the outset of the trial by defendants; the motion for nonsuit by defendants; the motion for directed verdict by defendants and all objections to the introduction of evidence and the rulings of the court thereon, and all instructions given and all objections to the giving or failure to give any instructions in the above entitled matter made by any of the parties hereto, and all argument by counsel to the jury, statements to the jury, and statements by the Court to the attorneys and to the jury during the course of the trial.

The foregoing comprises the entire record and all the proceedings in the above entitled matter.

Two copies of said transcript are filed herewith.

Dated this 30 day of August, 1944.

COMBS & MURPHINE

GEORGE P. KINKLE

JOHN S. HUNT

LEE COMBS

By Lee Combs

Attorneys for Defendants.

Received copy of the within designation this 30 day of August, 1944.

David C. Marcus

Attorney for

[Endorsed]: Filed Aug. 30, 1944. [147]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 147 inclusive contain full, true and correct copies of Amended Complaint for Personal Injuries; Motion of Al G. Barnes Amusement Company to Dismiss; Memorandum of Order; Order; Answer of Al G. Barnes Amusement Company, etc., to Amended Complaint; Separate Answer of Ringling Bros.-Barnum & Bailey Combined Shows, Inc.; Amendment to Answer of Al G. Barnes Amusement Company; Amendment to Answer of Defendants; Order Under Rule 16 of Rules of Civil Procedure; Motion for Directed Verdict; Minute Order Entered January 11, 1944; Jury Instructions; Defendants' Objections and Exceptions to Plaintiff's Requested Instructions; Verdict; Judgment; Notice of Entry of Judgment; Motion to Set Aside Verdict and Judgment Entered in Favor of Plaintiff and to Enter Judgment in Favor of Defendants in Accordance with Motion for Directed Verdict by Defendants Heretofore Made and for Judgment Non Obstante Verdicto; Affidavit of Service of Motion to Set Aside Verdict, etc.; Motion for New Trial; Affidavit of Service of Motion for New Trial; Affidavit of Lee Combs in Support of Motion for New Trial; Stipulation and Order re Filing of Counter-Affidavits; Affidavit of David C. Marcus in Opposition of

Motion for New Trial; Stipulation Fixing Time for Hearing Motion for New Trial; Minute Orders Entered March 7, 1944 and June 30, 1944 respectively; Notice of Filing of Stay Bond; Stipulation re Supersedeas and Cost Bond on Appeal; Order for Supersedeas and Cost Bond on Appeal; Bond on Appeal to Stay Execution; Notice of Appeal of Ringling Bros.-Barnum & Bailey Combined Shows, Inc.; Notice of Appeal of Al G. Barnes Amusement Company; Undertaking for Costs on Appeal; Stipulation and Order for Transmission of Original Exhibits; and Designation of Record on Appeal which, together with Two Volumes of Original Reporter's Transcript and Original Plaintiff's Exhibits 1 to 6 inclusive and Original Defendants' Exhibit A constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for comparing, correcting and certifying the foregoing record amount to \$24.70 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21 day of September, 1944.

[Seal]

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON TRIAL

Appearances:

David C. Marcus, Esq.,
For Plaintiff.

Lee Combs, Esq.,
For Defendants.

Los Angeles, California, Tuesday, January 4, 1944;
10 A. M.

AMERICA OLVERA POLLINGER,

the plaintiff herein, called as a witness in her own behalf,
being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Marcus: Your full name, please?

A. America Olvera Pollinger.

Q. Have you been known as America Olvera?

A. Yes, sir.

Q. Miss Olvera, what is your age at the present time?

A. I am 35 years old.

Q. Where were you born?

A. Mazatlan, Sinaloa, Mexico.

Q. Are you a naturalized American citizen?

A. Yes, sir.

Q. When did you first begin to learn the trapeze
work? A. When I was five years of age.

Q. Where was that? A. In Mexico.

(Testimony of America Olvera Pollinger)

Q. By whom were you taught?

A. By my father.

Mr. Combs: It may be understood that my objection stated to the court, and likewise the ruling, goes to this entire line of questioning?

The Court: So understood. [2*]

Q. By Mr. Marcus: Miss Olvera, were you a member of a troupe of artists in Mexico? A. Yes, sir.

Q. Who did this troupe compose?

A. There was my own family, composed of my father, mother, brothers, sisters, uncles, and aunts, grandfather and grandmother, and so forth, for five generations before me, were trapeze artists.

Q. You had brothers and sisters in the act, you say?

A. Yes.

Q. How many were there? A. 16.

Q. Brothers and sisters? A. Yes, sir.

Q. When did you first begin to learn your trapeze act?

A. The very first beginning when I was five years old; that was not on the trapeze. My dad began balancing me with the palm of his hand, and with my two feet, he held me like that, and walked and sat me down and up; and when I was six years old, he made my first trapeze, and I had to practice on that.

Q. You traveled with your family, did you, through the Republic of Mexico? A. Yes, sir, I did.

Q. This was ever since you were born?

A. Ever since. I was born on the road. [3]

(Testimony of America Olvera Pollinger)

Q. When did you first learn, so far as your act is concerned—I might ask you, you learned the routine, you learned the act you used during your entire lifetime?

A. Yes, sir, that was the only one I ever knew.

Q. What was the first routine you learned?

A. The very first routine I learned was to stand up in the trapeze, which was a wide trapeze, according to my body, and I learned to stand frontwise, with my two hands like that, looking straight to one point, swinging my hands to keep my balance. When I secured that exercise, I learned to stay sideways with the line in front of my face, and my two arms open, and when I secured that exercise I learned to take off one of my feet, and so on; when I secured one exercise I began to learn the other.

Q. What was the second routine you learned?

A. The second routine I learned was to kneel down in the trapeze.

The Court: Mr. Colburn, can you hear the witness' testimony?

Juror Colburn: Yes.

The Court: Let the record show that the court addressed No. 1 juror in the box, which is the furthest away from the witness stand.

Q. By Mr. Marcus: What was the second act you learned?

A. The second act I learned was to kneel down on the trapeze. After I secured the balance kneeling down then I [4] learned to take off one of my knees and learned to kneel on just one, and stretch out my hand and other leg. Then I put my knee back on the trapeze, and put a silk handkerchief on my knees, and picked it

(Testimony of America Olvera Pollinger)

up with my mouth, with my two hands crosswise like that, on my back.

Q. And your third?

A. The third one was to stand steady on the trapeze, frontwise, with my hands high, and jump up in the air, and come back on the trapeze in the original position; and then stand with my head down on the trapeze, and my legs out; then I took two big chairs, and put the two back legs on the bar and balanced, and I went up to the top four feet, and opened my hands out. Then I learned to jump like the prizefighters, doing exercises like with a rope, standing on the bar of the trapeze, frontwise. I stood there with the rope, and I held my body steady, and jumped, putting the rope between the trapeze and my feet, until I did it four times. Then, after some time, with that exercise, my dad began teaching me to swing on the trapeze frontwise, and jumping in front, and when it was swinging in back, I jumped that way, and I threw the rope out. I learned to stand on my hands and I learned to stand frontwise in the trapeze, and with my two hands out, I would swing, and would oscillate on my body until the trapeze turned this way, and then with the lines twisted, always with my hands out, I never did touch the line; then I would stay steady on one of my feet, with the foot [5] out, and wait until the trapeze untwisted itself, and when the trapeze untwisted itself—

The Court: Mr. Marcus, do you think it is important to go through these details, until she did attain the position of a recognized trapeze artist?

Mr. Marcus: The only thought I had, it would save time, because we would not have to repeat it when it came to her performance with the circus.

(Testimony of America Olvera Pollinger)

The Court: When you get down to the act, I think it is important, but when it comes to these various steps in training, I don't think it is important.

Q. By Mr. Marcus: When did you first begin to appear in public?

A. When I was eight years old.

Q. Where was that?

A. In the State of Yucatan, Mexico.

Q. Did you continue to appear in public after you were eight years old? A. Yes.

Q. Tell us briefly, when you appeared in public, your experience in connection with trapeze work.

A. Since I was eight years of age I began travelling throughout the Republic of Mexico, Central and South America, and from there I went to Havana, Cuba, and from there to the United States. Every season, when the circus closed, after the summer season, in the United States, I would go with the [6] winter circus all over Europe, and when I got through the winter season I came back and continued with my employment in the United States with Ringling Bros. and Barnum & Bailey.

Q. Did you perform the same act you have described to us, all through your experience? A. Yes.

Q. You continued with that same routine?

A. Yes.

Q. When did you first come to the United States?

A. In 1933.

Q. By whom were you employed at that time?

A. Ringling Bros., Barnum & Bailey.

(Testimony of America Olvera Pollinger)

Q. Did you meet Mr. Pat Valdo at that time?

A. Yes.

Q. From the year 1933 until the year 1936 were you in the employ of Ringling Bros. show?

A. Yes.

Q. From the year 1933 to 1936 you travelled all over the United States with the Ringling Bros. circus?

A. Yes, I did.

Q. Performing the same act? A. Yes.

Q. Were you travelling with the circus on the 24th of September, 1936? A. Yes.

Q. Did you have a conversation at that time with Pat [7] Valdo? A. Yes, I did.

Q. Was he with Ringling Bros. circus at that time?

A. Yes, he was personnel director.

Mr. Combs: We offer to stipulate at this time that the contract you have in your hand was executed pursuant to negotiations between Mr. Valdo, representing at that time Ringling Bros. circus.

The Court: Isn't that sufficient?

Mr. Marcus: Yes. Will you stipulate that Mr. Valdo was not present at the time Miss Olvera signed the agreement?

Mr. Combs: I don't know that. If you will ask her.

The Court: Let me ask you: In view of the Appellate Court's decision in this matter, is that important?

Mr. Marcus: I don't think so.

Mr. Combs: No.

Mr. Marcus: We offer the contract in evidence at this time.

(Testimony of America Olvera Pollinger)

The Court: Let it be received and marked Plaintiff's Exhibit No. 1.

Mr. Combs: I suggest, if your Honor please, that the contract be read to the jury. It has got to be read sooner or later, or should be.

The Court: It isn't necessary that all of it be read, is it, but the particular parts you wish to have read?

Mr. Combs: I will read them myself. [8]

The Court: You may do so now, or at any other time.

Q. By Mr. Marcus: Miss Olvera, do you remember where this contract was signed?

A. In the State of Texas.

Mr. Combs: I object to that as incompetent, irrelevant and immaterial, in line with the ruling of the Appellate Court.

The Court: I don't see how that can be material.

Mr. Combs: I ask that the answer be stricken.

Mr. Marcus: It may go out.

Q. Did you at that time have a conversation with Pat Valdo? A. Yes.

Q. Relate the conversation to the jury, at the time the contract was executed.

The Court: What is the importance of it, when you have the contract received in evidence?

Mr. Marcus: It has to do with being sent to the Barnes show at that time.

Mr. Combs: I offer to stipulate, your Honor, that by virtue of that particular contract she was directed and sent by Pat Valdo, personnel director of Ringling Bros.

(Testimony of America Olvera Pollinger)

show, to Barnes' show; that she was received there, and employed by that show under the terms of that contract.

Mr. Marcus: Not as an employee of the show.

Mr. Combs: Eliminate that phrase of the stipulation. [9] We will go that far with you. I meant to state that she worked for the Barnes show under the terms of the contract.

The Court: Might it not be agreed that she was an independent contractor?

Mr. Combs: Yes.

Mr. Marcus: So stipulated, your Honor.

Q. What did your apparatus consist of during the year you were employed by Ringling Bros. show, and at the time you went to render your services with the Barnes show?

A. My apparatus consisted of two big main falls. We call the falls, the heavy rope with blocks.

Mr. Marcus: I think at this time we will offer in evidence the apparatus of Miss Olvera, and ask her if it would be possible for her to explain the operation of it by pulling it over there and opening it up.

The Court: You may proceed.

Q. By Mr. Marcus: I show you a bar with two rings on the end of it. Will you explain how this apparatus is connected with the rendition of your act?

A. These two clevises go up like that, which are attached, each one, to a big hook which comes from a big main pole from the big top: then from some clevises come two hooks to each side, which are attached to each side to main guy lines which go to the extreme of the

(Testimony of America Olvera Pollinger)

ring where we perform, and are fastened to iron stakes or wooden stakes, with some ropes to pull a certain way so the main bar would [10] be level also to the bottom bar. The upper bar should be level also to the bottom bar, which is the same width, only with the difference that it has two stars on each side.

Q. Does this bar attach to the roof of the tent?

A. Yes.

Q. Does it go to the top of the tent?

A. Yes.

Q. How high is that from the ground?

A. The top is higher than where this goes. The top may be about 50 or 40 some feet, but the main bar goes from the ground up in the air about 35 feet.

Q. This attaches to ropes that go onto the main poles of the tent? A. Yes.

The Court: Designate that. This will not mean anything in the record.

Mr. Combs: Call this ring the clevis.

Mr. Marcus: Do you want to call it a clevis?

Mr. Combs: That is what it is.

Mr. Marcus: We will call it a clevis then.

Q. Is this the bar that you perform on, Miss Olvera? A. That is the bar.

Q. Is this the bar that you have used during your entire performances? A. Yes.

Q. How long have you used that same bar? [11]

A. All my life, sir.

Q. Does this bar suspend from the other bar by these rods and ropes we have? A. Yes.

(Testimony of America Olvera Pollinger)

Q. When is this bar attached or set up in the tent?

A. That goes up when the big top goes up in the morning; when we arrive in town; it goes with the whole circus equipment.

Q. This goes up when the big top goes up?

A. Yes. We call the big top the biggest one in the show where we perform.

The Court: The largest tent is called the big top?

A. Yes.

Q. By Mr. Marcus: When does the rest of this go up; that is, the main bar that you perform upon?

A. That goes up during the time the show is on.

Q. This bar that you perform upon, do you know when it goes up?

A. During the performance of the show.

Q. Just before you begin your performance?

A. Yes, sir, sometime about then.

Q. What holds this clevis in position?

A. Big hooks from the main top, big iron hooks.

Q. Are there any guy lines or guy ropes that go off of this to the ground?

A. Yes, over this way and over that way. [12]

Q. From each end?

A. Yes, sir, from each end.

Q. What are those fastened to?

A. To iron stakes.

Q. How high from the ground is the bar that you perform upon, Miss Olvera?

The Court: She has already stated.

(Testimony of America Olvera Pollinger)

A Juror: May I ask a question?

The Court: Yes.

A Juror: When you say the bar she performs upon, that is the trapeze bar that has the stars?

Mr. Marcus: That is correct.

Q. How far is that from the ground at the time of your performance, Miss Olvera?

A. At the time of my performance, about 22 feet, because then these lines use the rest of the space up to the tent, about 11 feet.

Q. You mean these lines on the side, from the top to the lower bar?

A. Yes, they would use up the space from the top down to where the other extreme of the trapeze hangs.

A Juror: Is that bar held rigid by these brace wires, or are they movable?

Mr. Marcus: Rigid may be difficult.

The Court: She doesn't understand some terms.

Q. By Mr. Marcus: Does the bar swing back and forth? [13] Does the top bar swing at all?

A. No, it doesn't swing. That stays there steady, fastened by the guy lines.

A Juror: Which is the bar 35 feet? There was a measurement of 35 feet mentioned a while ago.

A. The one which my husband has already guyed up, and that is steady, fastened.

Q. The other is 22 feet? A. Yes.

Q. In other words, the rope is 13 feet long?

A. I don't think it is exactly 13 feet. I am just approximating it. Perhaps 11-1/2 or 12.

(Testimony of America Olvera Pollinger)

Q. By Mr. Marcus: Miss Olvera, how are the lines supposed to be set up, when they are properly set up?

A. Straight, hanging down.

Q. What happens when a line is set up like that?

A. It happens the way it happened to me. That is the way the hook was.

Mr. Combs: I object to that as leading and suggestive.

The Court: It has been answered; but I don't believe your objection is good.

Mr. Combs: I should like to approach the bench for the purpose of making an objection.

The Court: Is it something you feel should be made—

Mr. Combs: I feel that it should be called to the court's attention. [14]

The Court: Not in the presence of the jury?

Mr. Combs: I am inclined to believe that.

I have observed Mr. Marcus and Mr. Pollinger making a studied effort to have the clevis hook overlap, and hook over. I think it is a deliberate attempt to convince the jury that was the way the clevis was. I think his conduct is not only reprehensible, but damaging to the defendants.

The Court: You may proceed. You will have ample opportunity to show how it should be, Mr. Combs. Mr. Marcus is trying to present it from his view of the evidence. He has a right to present his case from his theory, and there is nothing to prevent you from straightening it out at another time.

(Testimony of America Olvera Pollinger)

Mr. Combs: In fact, I don't see why he does it now. He can hook that up at a later time and show how he thinks it was. I have observed him a half a dozen times.

The Court: You can get that all before the jury.

Q. By Mr. Marcus: Does that throw any part of the line out of balance?

Mr. Combs: I object to that as leading and suggestive.

Mr. Marcus: I withdraw it.

The Court: I think it is probably suggestive.

Q. By Mr. Marcus: What effect does an overlapping 8 hook have upon the balance of the trapeze?

A. The balancing of the trapeze, if it is the lower bar, and is perfectly level, it won't make any difference if [15] the hook overlaps like that, if it is perfectly level. The bottom one wouldn't make any difference.

Q. Is there any way of counteracting for this overlapping hook by any guy lines or ropes?

A. I don't understand.

Mr. Combs: I object to that as calling for the conclusion of the witness.

Q. By Mr. Marcus: Is there any way of making the bottom bar level in the event that this 8 hook overlaps, as it does here?

Mr. Combs: I object to that as calling for the conclusion of the witness.

Mr. Marcus: If she knows.

The Court: She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I don't mean an

(Testimony of America Olvera Pollinger)

expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?

A. I would like to hear it again.

Q. By Mr. Marcus: In the event this 8 hook is overlapping, as it does, the guy lines that you testified to before, that come off of this clevis to the ground, can they be adjusted or pulled in any way so as to make the bottom bar level? A. Yes, sir. [16]

Mr. Combs: I object to that as leading and suggestive. He is telling the whole story himself, and asking for a yes or no answer.

The Court: In the case of *People v. Jones*, 160 California, Mr. Combs—if I have that citation correct, and I believe I have—the mere fact that a question calls for a yes or no answer is held not to be leading; but it is important that you do not lead or suggest to the witness, Mr. Marcus. This is a very important phase of the case, apparently. I think you should first show how that 8 hook you refer to should hang ordinarily. I think that should be brought down just as the other one is. Proceed, Mr. Marcus.

Q. By Mr. Marcus: Will you tell us how, when the hook is in the position that it is—

The Court: For the purpose of the record you should have explained what position it now is in, Mr. Marcus.

Mr. Marcus: The 8 hook overlaps the ring on the upper bar.

The Court: The top part of the 8 hook?

Mr. Marcus: That is right.

(Testimony of America Olvera Pollinger)

The Court: Turn it around, so the jury may see it. Now proceed with your examination.

Q. By Mr. Marcus: Tell me how the lower bar can remain level when one of the lines overlaps, the way we have indicated here.

Mr. Combs: I object to that as calling for the conclusion [17] of the witness.

The Court: Overruled. You may answer.

A. I know now how it would be, from experience

Q. By Mr. Marcus: Tell us how.

A. When I went up in my trapeze, the bar was perfectly level, when the hook overlapped itself, the other one on top was twisted, and with a jerk, when I swing one of the lines, it lengthened itself, and the trapeze never gave a swing any more, like this. I wish I never fell down, but that swing to one side, that way, throw me out, because one line wasn't straight in the bar from the top; my husband lower one side to lead up to the other one which was shorter.

The Court: Do the members of the jury understand the answer?

A Juror: Is there any method of checking before the performance to see that everything is O. K.?

The Court: Is there any objection to that question on behalf of either party?

Mr. Combs: We have no objection to that.

The Court: Answer the question.

A. No, it wouldn't be possible, because it was a little bit over the middle of the season when the accident occurred and the tent is not more white, not now any

(Testimony of America Olvera Pollinger)

more; it is all full of dust and smoke, and it is very dark, and it being the crane bar, it is way into a curve in the tent and is exactly in darkness, and the accident occurred when the sun was almost [18] going down.

The Court: Read the answer please, Mr. Dewing.

(Answer read by the reporter.)

The Court: About what time of the day or night did this accident occur?

A. Pretty near 4:00 o'clock.

The Court: Nearly 4:00 o'clock in the afternoon?

A. Yes.

The Court: Go ahead.

Q. By Mr. Marcus: You reported to San Diego, did you, for the Barnes show? A. Yes.

Mr. Marcus: I presume there will be no objection to the letter going in evidence.

Mr. Combs: No objection.

Mr. Marcus: We offer this letter in evidence at this time.

The Court: What is the purpose?

Mr. Marcus: To show that she was directed to go there, your Honor.

The Court: I don't believe Mr. Combs is making any point on that, are you, Mr. Combs?

Mr. Combs: She was directed to go by Valdo, and reported for the opening of the Barnes show.

The Court: And she was actually performing her act under her contract at the time of the accident? [19]

Mr. Combs: Yes.

(Testimony of America Olvera Pollinger)

The Court: Which occurred in Anthony, Kansas?

Mr. Combs: At nearly 4:00 o'clock in the afternoon of a certain day.

The Court: Yes.

Mr. Marcus: Yes.

Q. By Mr. Marcus: Is this your apparatus?

A. Yes.

The Court: That date was the 11th day of September, 1937, as alleged in the complaint?

Mr. Marcus: That is correct.

Q. Did you have a conversation with a Mr. Cronin, at San Diego?

The Court: What is the purpose of that?

Mr. Marcus: To show that they furnished her with a net.

Q. Did you have a conversation with Mr. Cronin in San Diego? A. Yes.

Q. Was that at the beginning of the 1937 season?

A. That was before we began.

Q. Can you give us the approximate date of that?

A. Yes, sir, it was the 19th of March.

Q. At San Diego? A. Yes.

Q. Who was present at the conversation you had with Mr. Cronin? [20] A. Mr. Thornton.

Q. Who is Mr. Cronin?

A. The Circus manager.

Q. For the Barnes circus?

A. For the Barnes circus.

(Testimony of America Olvera Pollinger)

Q. Relate the conversation you had with him respecting a net.

A. I first introduced myself to him, being after I introduced my own self to Mr. Thornton, the ring director of the show.

Mr. Combs: May I interrupt for an objection? May I approach the bench? We object to the introduction in evidence of any discussion, or evidence concerning the use of a net, upon the ground that the same is not part and parcel of the apparatus referred to in the plaintiff's complaint.

The Court: The objection will be overruled; but I don't see why that sort of an objection should not be made before the jury.

Q. By Mr. Marcus: Relate the conversation you had with Mr. Cronin respecting the net.

A. We started to tell him who was I. He told me, "Yes, Miss Olvera, I got a letter from the Ringling show. They told me they are sending me a feature act on the trapeze," and then he said they told him it was a very good act. I say "You wish to see the act, in a little practice, the same [21] way that I am going to give it in the program during the season?" So I told him I did need a safety net to perform the act. He told me "Did you have one in the big show?" He called it the big show. I told him "Yes, sir, I did have one." He say, "All right, we have a net; we have a net made for you." Then I perform the act without the net. I performed for a little practice, and there would be a big rope attached to that clevis in the middle of the crane bar, tied to my waistline, and two men hold at the other end, on the ground. I

(Testimony of America Olvera Pollinger)

perform practice like that, because I did not have no safety net. When I came down to the ground he told me, "Wonderful. I like your act very much. It is to close the show." When I came down to the ground he told me, "Miss Olvera, there is your net."

Mr. Combs: Is this all part of the conversation?

A. Yes.

Q. By Mr. Marcus: He stated to you "This is your net"?

A. Yes, "There is the net," and I said, "I want to tell you what to do with the net." Then he called Mr. Blackie Williamson, which was the property man, or supervisor, or boss, and he said to tell Mr. Williamson what they are supposed to do with the net, and he will do it for you. So I told him that the net was to keep under my apparatus, underneath, and have a capable man to do so, and watch me constantly, with the hands here in the loops of the net. It is a canvas net with loops around, and men around the canvas, [22] and they hold it, and watch me, and I told him to move wherever I move. Then we began the season. Then my net was there—

Mr. Combs: Are we on the conversation now?

A. Yes, sir.

Q. By Mr. Marcus: You began the season in San Diego?

A. Yes.

Q. Did you have a net furnished you, as you stated, by the circus, at San Diego?

A. Yes, sir.

(Testimony of America Olvera Pollinger)

Q. Did you ever have a net of your own?

A. No.

Q. Was that net given to you by Mr. Cronin, the director of the Barnes show?

A. Yes, that is the show's net.

The Court: You say given—

Mr. Marcus: Furnished, I mean.

The Court: You don't mean that a gift was made of the net?

Mr. Marcus: No.

The Court: Or do you?

Mr. Marcus: I don't, your Honor.

Q. Who held the net?

A. The net men, which the show has got them for that purpose.

Q. Were any of those men ever employed by you? [23]

A. No, sir.

Q. Did you ever pay them? A. No.

Q. Did they appear at each of your performances?

A. Yes.

Q. Over what period of time?

A. From March 20, 1937 to September 11 or 12, 1937, the afternoon performance.

Q. And evening performance?

A. No, sir; just the afternoon performance. That was the last one in my life.

(Testimony of America Olvera Pollinger)

Q. Prior to that time, in Anthony, Kansas, did you perform during the evening on this itinerary from San Diego to Anthony, Kansas? A. Yes.

Q. How many times did you perform?

A. Twice a day.

The Court: Once in the afternoon and once in the evening?

A. Once in the afternoon and once in the evening.

Q. By Mr. Marcus: On each of those occasions where these net men there? A. Yes.

Q. And did they hold the net? A. Yes.

The Court: Mr. Marcus, it is time for our noon recess, which the court is about to take. Mr. Clifton thinks you offered the trapeze and apparatus in evidence, but I don't [24] recall you did.

Mr. Marcus: I did at the time. I don't think there was any ruling. The court hasn't ruled on it.

The Court: It may be received and marked Plaintiff's Exhibit 2. The court will now recess until 2:00 o'clock this afternoon. During this recess the jurors will bear in mind the admonition given by the court heretofore, and return at 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p. m. of the same day.) [25]

Afternoon Session

2:00 o'clock.

(Stipulated that the jurors are all present and in their places.)

AMERICA OLVERA POLLINGER,

recalled.

Direct Examination

resumed.

Q. By Mr. Marcus: Miss Olvera, when you arrived at San Diego, at the beginning of the season, did you have your apparatus with you? A. Yes, sir.

Q. Did it have a lock on it?

A. Yes, it did.

Q. You carried it in this trunk?

A. In this trunk.

The Court: When you speak of a lock on it, do you mean on the apparatus?

Mr. Marcus: No, I mean on the trunk.

Q. What did you do with the key to the trunk?

A. I delivered it to the property man boss.

Q. Who was that? A. Howard Mentz.

Q. What did you do with the apparatus?

A. It was inside the box.

Q. Did you deliver the apparatus too to the property man? [26] A. Yes.

Q. That was Howard Mentz?

A. Howard Mentz, yes.

(Testimony of America Olvera Pollinger)

Q. What connection did he have with the Barnes show?

A. He was supervisor of the property men, working men of the show.

Q. Was he employed by you in any way?

A. No, sir.

Q. You paid him nothing for his services?

A. No, sir.

Q. And he was with the show?

A. He was with the show.

Q. Did you have any actual physical possession of your apparatus at any time after that, after you delivered the box and apparatus to the show at San Diego?

A. No, sir.

Mr. Marcus: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled. The answer may stand. What is the answer, Mr. Dewing?

(Answer read by the reporter.)

Q. By Mr. Marcus: I believe you testified this morning that you had a conversation with Mr. Cronin with reference to a net.

A. Yes, sir.

Q. And on your itinerary from San Diego until you [27] reached Anthony, Kansas, this net was furnished you in the performance of your act, is that correct?

A. Yes.

Q. How many men held the net?

A. Eight or ten, as far as I can remember.

(Testimony of America Olvera Pollinger)

Q. Will you describe how large the net was?—or did I ask that question, your Honor?

The Court: I think not.

Q. By Mr. Marcus: Will you describe how large the net was?

Mr. Combs: I understand our objection to testimony respecting the net is continuing, and that it will be so stipulated, without having to make it each time, after each question.

The Court: I did not so understand it, but that is very satisfactory to the court, if it is to Mr. Marcus.

Mr. Marcus: Yes.

Q. Will you ask the question again, Mr. Reporter?

(Question read by the reporter.)

A. The net was about 10 x 10 feet square.

Q. These men, you say, held the net?

A. Yes, they did.

Q. Explain to the jury how the net was held.

A. The net was held by some loops, which are attached to the very net, and the net men put the loops through their hands, and then a rope overlaps, and they reach, and it goes [28] through the palm of their hand, and they catch it like that. The net is held with the two elbows on the waistline, so in case the performer loses control, when they fall the elasticity of the arms will give a little, and then the performer has a safer place to fall. I don't know how to explain it.

Q. On each occasion of your performances, twice a day, this net was there in the ring, is that correct?

A. Yes, sir.

(Testimony of America Olvera Pollinger)

Q. What ring did you do your performance in?

A. In the center ring.

Q. In the center ring? A. The middle ring.

Q. There were two other rings, on each side?

A. Yes. I was the leader of the aerial act.

Q. Do you know whether or not this net was used in any other performance in the circus?

A. In the Barnes show it wasn't, but in the Ringling show it was used by other actors. The net belonged to the show.

Q. You never brought this net? A. No, sir.

Mr. Combs: I object as leading and suggestive.

The Court: The questions are leading.

Q. By Mr. Marcus: Did that net belong to you?

A. No, sir.

Q. Did you pay any of these men for holding the net? [29] A. No, sir.

The Court: I think you asked that question. It is my recollection that you have. Possibly it will take less time to hear the answer than to look up the record.

Mr. Combs: I think it was asked twice before.

The Court: And answered, too?

Mr. Combs: Yes.

Q. By Mr. Marcus: Miss Olvera, will you please explain to the jury how you established your position on the bar that you performed upon, so that you could balance yourself when you are performing your act?

A. I have got to explain from the beginning.

(Testimony of America Olvera Pollinger)

Q. I want you to do that.

The Court: Maybe she does not understand the word "establish."

A. I really don't.

Q. By Mr. Marcus: You don't understand the word "establish"? A. No.

Q. How do you place yourself?

The Court: She has used the word "balance."

Q. By Mr. Marcus: How do you balance yourself? Do you understand the question? A. Yes.

Q. Answer it, please.

A. I balance myself in whichever position I pose my [30] body, with the two hands in front, if I am frontwise, and to steady I look at one point, which we call in the performance ring the point of view; but I don't do it very low; not very high, but this way, naturally. I am performing just with my feet, my legs and my arms, whatever I have to do to hold the balance. I never take my eyes from there, because I would get out of control. My body will go like this, and when I swing I place my point of view; when I swing far, there is one place I look, at the top, steady. That is the only steady point I have, because if I look at the ground the ground won't be moving, but I would be moving, and I would lose my point of view.

Q. In order to balance yourself there must be an established point of view? A. Yes.

Q. During all of this act?

A. Yes, during each one of the exercises I might be doing.

(Testimony of America Olvera Pollinger)

Q. When you arrived in Anthony, Kansas, do you remember what time of the day your performance started, on the 12th of September?

A. My performance started around 4:00 o'clock, because we arrived late that day in Anthony, Kansas.

Q. Tell us how you started your act.

A. The beginning of my act in the Ringling show, which was the very same lapse of time, which I used when they sent [31] me to the other show, the Barnes, was the duration of three minutes, the first part of the act, and two minutes approaching the second part. The first part did consist of three acts. At the same time two other ladies in the other rings and me in the center, as the feature. I did have shorter—the Ringling show requires shorter acts than I used to do it. I used to come into the ring with the Spanish costume, with a cape, and I did some steps, like dancing, with my cape, and then the property man came and took my cape. Then I went into the middle ring, and they have got the rope there for me to go up, and they pull me up; then I reach like that, and I go up, with my feet between, and my two arms, and I put my knees on the bar, and I swing out and catch two little bars, and open my hands—

The Court: As she is testifying you haven't indicated what it is in the record, and it won't be of any effect so far as the record is concerned.

Mr. Marcus: When you indicate, explain what you are indicating.

The Court: I think you had better do that. I think she might have some difficulty, because of her lack of knowledge of the language.

(Testimony of America Olvera Pollinger)

Mr. Marcus: You proceed, and I will explain for the record.

The Court: Go ahead, Miss Olvera.

A. Right at that time the three acts begin at the same [32] moment. I lift my hands off the lines of the trapeze; I put them to the front, as I am sitting in the very bar.

Q. By Mr. Marcus: Indicating—

A. With my hands forward; I put my hands in front first, in the bar, with the hands here—

The Court: The hands upward, extending in front of the body.

A. Yes. Then I put my left foot in the same position, going up, and never touch the lines. Then with the oscillation of my body I begin swinging the bar one way, slightly sideways, while my body is still in front, with the oscillation of the body. Then when the swing is lively, then I turn sideways, with the line in the direction of my nose. Then I fix my point of view right on that line, on that wire. Then I open my hands. I do this. Then I revive that swing again, with the oscillation of the legs, and then I take one of the legs out and put it here, also with two hands, then I place this foot back on the trapeze and turn with some oscillation of the body. I steady the trapeze again, not to move. Then I take a bow. Then from there I go around, turn. I stay like this—

Q. By Mr. Marcus: Indicating the two legs on the bar frontwise.

A. The lines of the trapeze go by my side of the body.

(Testimony of America Olvera Pollinger)

Q. The right side of the body?

A. Both sides. Then my two feet are standing like that. [33] Then my body turns around but not my legs. My feet never move. My legs get twisted from this other side. Then I do the exercise again on the same position that I did it on the other side. Then from there I kneel down and take one knee out of the trapeze, and put one hand on that one knee, which is the left knee, the right hand. Then I raise the right leg way up with one hand, and then I pick up a silk handkerchief with my mouth. Then I place back the knee. I do the exercise with the trapeze steady. I pick up the handkerchief between my knees, and with two hands crosswise, like that in back of my body. Then I bow; put up my right leg again; put my left; stand up, and take a bow, without touching the lines of the trapeze. Then from there, with the oscillation of my body, I swing in an oscillatory way.

Q. Indicating a circular motion?

A. Yes. Then I pull with the swing, with my legs on the trapeze. I never touch the lines. The lines twist one against the other until they get in back of my body, way down below my waistline. Then from there I take one leg out, placing the hands out, and wait in that position until the trapeze itself untwists to the original position in front, and when it gives a nice swing out. Then I take a bow, and with the oscillation of my body I steady the trapeze again. From there I sit down; take a bow. Then my husband comes in front, and with the line, which is hanging on the right side of the crane bar, he pulls me twice, and I go with this leg [34]

(Testimony of America Olvera Pollinger)

twisted, like this, with the toe of the foot. Then he pulls me one or two times; then I go out. I revive the swing with my two hands, sitting like the little kids do in school with the swing. Then I lift my hands on the lines, sitting in the very same position, and put my hands like this.

Q. Extending in front?

A. Yes, extending in front, and when the swing goes—before I reach the end of the swing, because the swing has to end and come back, when that swing finishes it goes up and back, the trapeze don't wait at all. Then it comes back, and then when it gets the time to swing out, I put my right foot in the trapeze in this condition, and then I will lose my point of view on the ground, and I will then see the crane bar, which is the only thing that don't move. I do this; kick my right foot, and go up. That is the last thing I did the day of the accident.

Q. What did you see when you looked up?

A. I saw the hook overlap.

Q. Was that the position it was approximately in when you saw it that day, which we heard of this morning, overlapping?

A. Exactly.

Q. Then what happened?

A. The hook overlapped.

Q. When you swung out, what happened?

A. When I put one leg to go out, I saw the hook over- [35] lapping, and the very moment I saw it it came loose, and threw me over to one side. I tried to save myself.

(Testimony of America Olvera Pollinger)

Q. What did you do in order to save yourself?

A. I know how to fall, and I place myself to fall in the net.

Q. How did you do that?

A. I went out this way, with my head down, because I tried to reach with my hand this line to catch me, this arm. The slack of the hook wouldn't let me catch the line, and I went this way. So, knowing there was a net, I make myself in a group and I catch my knees and my hands, like that. the way we learned to fall into the net, and tried to pull myself like for a somersault, and not hit with my head in the net. I hit with my back in the ground; not in the net.

Q. When you came out to perform your act on this day in Anthony, Kansas, and on all previous occasions on your itinerary, did your act start immediately as you came out into the ring? A. Yes.

Q. Did you have a band with the circus?

A. Yes.

Q. Were they playing music at the time you came out?

A. Yes.

Mr. Combs: I object to that as leading and suggestive, and I would ask that counsel refrain from that course of conduct. [36]

The Court: The court will admonish counsel to avoid leading questions.

Q. By Mr. Marcus: Tell us what the band was doing, Miss Olvera, when you came out to perform.

A. It was playing a Spanish piece for me to go into the ring.

(Testimony of America Olvera Pollinger)

Q. Where did you come from when you entered the ring, what place?

A. By the main entrance, right by the band music place.

Q. Did you have a performer's tent where you dressed and came to before you entered the main tent?

A. Yes, sir, I had a private dressing room.

Q. Did you have any special music that was played for you when you entered? A. Yes, always.

Mr. Combs: May I suggest again that these are leading and suggestive questions. I don't know how to stop him, your Honor.

The Court: Mr. Marcus, I wish you would bear in mind the court's admonition. However, this seems to be preliminary.

Mr. Combs: I don't care about it unless it gets up to the point where it is critical.

The Court: A great many attorneys are guilty of the same thing. I would like to have Mr. Marcus bear in mind that objections are made, and the court has to sustain them.

Q. By Mr. Marcus: Please tell the jury when your act [37] began what was done in connection with your act?

A. I first danced some Spanish steps with the music.

Q. Where does this dance take place?

A. In the middle ring; two or three little steps. Then I go out; then the music changes to something sweeter, and then I keep on going until it stops, because they announce me through the loud speaker; when the

(Testimony of America Olvera Pollinger)

other ladies come down, they be all around in the middle circus, and they announce me, and there is no music after that until I finish the act.

Q. Are you in a continuous performance from the time you went into the ring until your act is completed?

Mr. Combs: I object to that as calling for the conclusion of the witness. The witness may state what she does, but not her conclusion.

The Court: Sustained.

Q. By Mr. Marcus: Miss Olvera, is there at any time during your performance, from the time that you come into the tent until your act is concluded when you do nothing?

Mr. Combs: I object to that as leading and suggestive.

The Court: Overruled. You may answer.

A. I really don't understand.

The Court: I think she has explained very thoroughly what constitutes her act.

Mr. Marcus: Very well. I will withdraw the question.

Q. Miss Olvera, this trapeze that is marked in evidence, [38] when was that trapeze brought into position, so far as the performance of your act is concerned?

A. I never knew when it was brought into the ring.

Q. When was it placed in position, so far as your act was concerned?

A. Very, very shortly before my act takes place. I never knew, because I have nothing to do with that.

(Testimony of America Olvera Pollinger)

Q. Was it in position, that is to say, the same position that you performed on it during the rendition of the previous acts that are given in the ring?

A. What?

Q. During those acts that are given before you go up to act.

A. Is it up?

Q. Is it up in position?

A. Yes, it is.

Q. But is it during all of the performances of the other acts before you?

A. No, sir, because some of the other acts needs a place to hang the other rigging. They hang other rigging in the same place, so to tell you when my trapeze exactly goes up, I wouldn't be able. I don't have nothing to do with it.

Q. Who brings your rigging up into position?

Mr. Combs: I move to strike out "I don't have nothing to do with it," as a conclusion of the witness.

The Court: Denied. [39]

Q. By Mr. Marcus: Who brings your rigging into position, so that you can perform upon it?

A. The rigging men.

Q. Do you know who they are?

A. Very few of them. They was not steady; only three or four steady. The others one did last one week or a week and a half or two weeks sometimes so I can't say who are the rigging men.

Q. Did you employ any of the rigging men?

A. No, sir, I never did.

Q. Do you know who employed them?

A. The circus.

(Testimony of America Olvera Pollinger)

Q. When you fell, what happened?

A. As I was saying, I missed the net to my misfortune.

The Court: Read the answer, Mr. Dewing.

(Answer read by the reporter.)

Q. By Mr. Marcus: Did you see the net as you started to fall? A. I didn't see it.

Q. Do you know of your own knowledge whether or not this net moved at any time?

A. No, sir, it was not moved at all. I struck one of the men on the shoulder when I came down.

Mr. Combs: If your Honor please, the last part of the answer is not responsive. This witness is inclined to do that. I think a motion to strike lies, and, of course, the [40] damage is always done when the non-responsive part is put in, and I have no opportunity to object to it. Likewise, counsel's questions are leading and suggestive.

The Court: You may make your motion to strike out, if you think you would like to have the court consider it.

Mr. Combs: I don't want to hamper the speed, of course, of this trial, but I have to combat with this persistent leading and suggestive course, and likewise the non-responsive answers. Of course, I can't anticipate them. I wish counsel would refrain from asking them, and I wish the witness would refrain from giving non-responsive answers.

The Court: Would you read Mr. Combs' statement?

(Statement read by the reporter.)

The Court: Proceed.

(Testimony of America Olvera Pollinger)

Q. My Mr. Marcus: Miss Olvera, your husband was employed in the circus, was he? A. Yes, sir.

Mr. Combs: There is another leading question, which you get immediately.

Mr. Marcus: It is just preliminary, your Honor. I did not intend to do that.

Q. Was your husband employed by this circus?

A. Yes, sir.

Q. How long,—from what period of time had he been so engaged?

A. Since 1934. He was employed by the Ringling show. [41]

Q. Did he accompany you to San Diego?

A. Yes, with his act.

Q. Did you know that he was engaged during that same period that you were? A. Yes, sir.

Q. Was he in the ring at the time?

A. Yes, he was.

Q. Tell us when he entered the ring, of your knowledge.

A. He entered the ring with me. Always he did have already his costume to perform his act.

Q. When did his act go on?

A. I finished my act, and then there was some horses running around the tracks. Right after the horses go, my husband's act.

Q. What did he do in connection with your act?

A. He has an apparatus which is a symbol of the Eiffel Tower.

Mr. Combs: I object, your Honor, as being non-responsive. That was his act. The question was your act.

(Testimony of America Olvera Pollinger)

The Court: It may go out.

Q. By Mr. Marcus: What did he do in connection with your act?

A. In connection with my act he didn't do nothing.

Q. You say he was in the ring there at the time?

A. Yes.

Q. He went in the ring with you? [42]

A. Yes.

Q. What did he do when he was there?

A. He just help me to go up.

Q. You testified before that he pulled your line?

A. Yes, he pulled me up. He helped the prop man, and then he pulled me. He gave me the swing. That was all he did.

Q. That was what he did? A. Yes.

Q. You say that you missed the net, and fell to the ground? A. Yes, I did.

Q. Were you unconscious at any time?

A. No, I was not.

Q. Who was present in the ring at the time that you fell?

A. All the net men, my husband, the ring director, and some of the ring men, which I wouldn't be able to name them, because when I was falling down the only thing I saw was the net. I didn't see them.

Q. Did you make any statement at the time?

A. Yes, I did.

Q. In the presence of the ring men?

A. In the presence of everybody.

(Testimony of America Olvera Pollinger)

Q. What did you say?

Mr. Combs: I object to that as a self-serving declaration, incompetent, irrelevant and immaterial. [43]

Mr. Marcus: It is part of the *res gestae*, your Honor.

Mr. Combs: It is entirely self-serving.

The Court: You will have to lay the foundation more definitely, Mr. Marcus. How shortly after the fall?

Q. By Mr. Marcus: How soon after the time that you fell did you make a statement?

A. The very moment my husband came to pick me up.

Q. How long was that after you fell?

A. I hardly hit the ground. He ran to me to pick me up. I was looking at the trapeze. It was swinging just one end, like that. I saw I was too low on one side. He picked me up and tried to run with me. This arm was broken—

Mr. Combs: The whole answer is non-responsive; it does not relate at all to the question which was: What was said? The vice is that I have been given no opportunity to object to any of it, and I would ask that the entire answer be stricken so far.

Mr. Marcus: I submit that is an explanation, establishing the time when she made the statement.

The Court: Motion denied.

Mr. Marcus: Proceed.

A. Then he held myself like that, and I told my husband "Look, the trapeze dropped me down. God knows," I say, "look at the trapeze." He was only interested to take me out.

(Testimony of America Olvera Pollinger)

The Court: That part may go out as a conclusion. [44]

Q. By Mr. Marcus: Did you see the trapeze from where you were? A. Yes.

Q. What was the condition of the trapeze at that time? A. It was lower on one side.

Q. How much lower?

A. Three and a half to four inches.

Q. Miss Olvera, will you tell us what injuries you sustained at the time?

A. I sustained—I got that time a broken arm. This arm, the bone was out.

Q. Indicating the right arm? A. Yes, and I broke my right heel to my foot; my pelvis and my vertebrae to my vertebral column, my spinal vertebra. I figure, so far I know three are fractured, and two of them are—the body of the vertebrae have a crack, and they are inside of each other.

Q. Did you suffer any internal injuries at the time?

A. Yes, I did, but I won't be able to tell the jury.

Q. Can you have any children now? A. No.

Q. Where were you taken after this accident?

A. To the hospital.

Q. Was that in Anthony, Kansas? A. Yes.

Q. How long did you remain in the hospital in Anthony, [45] Kansas?

A. A week. Maybe five days or six days; something like that.

Q. Where did you go from there?

A. I went on a stretcher to the Pullman car. They took me from there—we joined the circus at Amarillo,

(Testimony of America Olvera Pollinger)

Texas. I went in the Pullman car of my own train, with three boards, one on the bottom of my body, and one here and one here.

Q. Indicating the right side:

A. With hinges. They opened them in the night so the movement of the train would not shake me. My husband used to hook me like that, like boxes they make for dead people, the same way, so my body won't be shaken. In the morning he would take me out, and let me rest, because the train was not moving then. I remained with the show until the show closed, in the Pullman car.

Q. How long was that?

A. The show closed in November.

Q. What did you do in November, after the show closed?

A. I came to Baldwin Park.

Q. You came to California?

A. Yes.

Q. Baldwin Park is here?

A. Baldwin Park is in California, the circus winter quarters [46]

Q. What did you do there?

A. I stayed in the train until my husband went and looked for an apartment; then he took me to the apartment, and I stayed there until already the season was going to open again, and I stayed in that apartment.

Q. Since you were injured, in the year 1937, Miss Olvera, have you ever performed your act on the trapeze again?

A. No, sir, I never did. I tried to practice.

(Testimony of America Olvera Pollinger)

Q. Where did you try to practice?

A. One time, because I would give anything for that. I went and practiced. I wanted to go on again

Q. When did you practice?

A. Shortly before the season was opened. I did have so much confidence in my balance I said "Even if my leg don't feel good" I went up and tried the balance. I put a line around my waistline for safety, and they pull me up, and when I touched the trapeze I screamed very badly, because it hurt so much my spine and arm. I couldn't do it.

Q. Was that the only time you attempted to practice?

A. Yes, that was the only time I tried.

Q. Since 1937 have you earned any money whatsoever? A. No, sir.

Q. Have you suffered much pain during the last seven years? A. Constantly I do.

Q. Over what period of time was it that you were in bed? [47]

A. A very long time. I really don't remember.

Q. You don't remember the exact time?

A. No. As a matter of fact, some days I still remain in bed.

Q. Do you use crutches now?

A. Yes, sir.

Q. For what period of time have you used those crutches?

A. Ever since I have tried to walk, after the accident.

(Testimony of America Olvera Pollinger)

Q. What is the condition of your legs at the present time?

A. My right leg is half numb; parts of the leg are numb, and is shorter, and some days very big, swollen. Some days it is pain, very pain, then a big swelling again, and so on.

Q. Do you suffer any pains in your legs?

A. No, not now. My leg don't feel well. My feet don't feel well.

Q. Where do you suffer with pain?

A. In my spine.

Q. Do you suffer with pain in your arms?

A. Just when it is cold; cold weather.

Q. Have you earned any money? A. No, sir.

Q. Since you had your accident? A. No, sir.

Q. Did you ever have a conversation with Pat Valdo [48] after this accident? A. Yes, I did.

Q. Where did this conversation take place?

A. In Ringling circus.

Q. Where? A. At Houston, Texas.

Q. Did you see Pat Valdo in the Barnes show on the date that your accident happened?

A. Yes, sir, I did.

Q. Did you at that time have a conversation with him? A. Yes, I did.

Q. Did you have a conversation with him after your accident? A. Yes, I did.

Q. Where did this conversation take place?

A. At the hospital.

(Testimony of America Olvera Pollinger)

Q. Will you relate the conversation, please?

Mr. Combs: Who was present?

Q. By Mr. Marcus: Who was present at the time that you had this conversation?

A. At the time with my husband and a wire walker, by the name of Billy Moralis, and a nurse, and I believe Mrs. Briton, I am not sure. I was a little bit sleepy from the ether they gave me.

Q. Do you remember the conversation?

A. Yes, I do. [49]

Q. Will you relate the conversation, please?

A. He spoke to me first, and he told me, "America, I am sorry that anything happened to you again." I don't know if I should say again, because—

Q. Go ahead; just tell what was said, what he said.

A. He said, "I am sorry, America, that has happened to you again, because there someone got the wrong rope, and make you fall down, and you have an accident in New York." He says, "Look what has happened to you." I said, "Yes, Mr. Valdo, isn't it awful?" I was feeling very bad. I cried. He said, "Don't feel bad, America. We will never let you alone." I said, "Please, Mr. Valdo, don't leave me alone. I haven't got money." I reminded him I have got my mother and three sisters to support. He told me "America, yes, I know. You are a good girl." He patted my shoulder and said "God bless you. You have got to go back to the show. Whatever you may need, whatever you want, just let me know, and you will have it." That was the conversation.

(Testimony of America Olvera Pollinger)

Q. Has the Barnes and Ringling shows ever paid you anything, under this contract, since the date of your accident?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial, and not proper direct examination; not proper within the issues of this case.

Mr. Marcus: She travelled with the circus afterward. I am trying to determine whether they have paid her for [50] travelling with them.

The Court: Objection overruled. You may answer.

A. No, sir. I went and asked once for my salary.

Q. By Mr. Marcus: Of whom?

A. Mr. Cronin, the manager of the Barnes circus. He told me I wasn't entitled to any salary. He told me "Miss Olvera, if you want any salary you have got to fight for it." I told him "I don't want to fight for it."

Q. They did not pay you anything? A. No.

Mr. Marcus: Cross examine.

Cross Examination

Q. By Mr. Combs: When you had the conversation with Pat Valdo your husband was still performing with the Barnes show, wasn't he?

A. My husband was with me in the hospital.

Q. Answer the question: Wasn't he performing?

A. No, sir.

Q. Wasn't he performing the week preceding that?

A. No.

Q. Do you mean they let him out too?

A. Yes; but I can explain. May I?

(Testimony of America Olvera Pollinger)

Q. Yes, do.

A. My husband couldn't perform after my accident occurred because I was his partner in the work. How could he perform? [51]

Q. You were his partner in the Eiffel Tower act?

A. Yes, sir.

Q. What did you do in the Eiffel Tower act?

A. I performed there on top of the Eiffel Tower, which he did hold on his shoulder with other boys.

Q. You say he did not perform at all with the circus after you were injured, is that right?

A. He did perform after three or four weeks, after the other trapeze artist, one of the other ones over there who used to work with me, practiced and learned a little part of what I used to do with him. That was Mrs. Cristiani.

Q. During all that time your husband received his salary as a performer? A. No, sir, he did not.

Q. Did he at all times perform?

A. After he performed, yes, but not when he lay off, because I was injured.

Q. When you were injured at Anthony, Kansas, you were seeking reemployment, or re-performance in the Ringling show, as distinguished from the Barnes, weren't you?

Mr. Marcus: I object to the question as compound.

The Court: Read the question, please, Mr. Dewing.

(Question read by the reporter.)

(Testimony of America Olvera Pollinger)

Mr. Combs: I think that is a compound question. I will withdraw it, and ask you again:

Q. At the time that the accident occurred, in Anthony, [52] Kansas, you were requesting of the Ringling show that you be returned as a performer in that show, weren't you?

Mr. Marcus: I object to that as calling for the conclusion of the witness.

The Court: Objection overruled.

A. Can I answer?

The Court: Yes, you may answer.

A. You asked me, sir, if I did ask the show to re-employ me?

Q. By Mr. Combs: Send you back to the Ringling show, isn't that right? A. In Anthony, Kansas?

Q. Prior to that time, and at that time.

A. I don't think I would be able to do that, positively not, with a broken spine.

Q. This was before the accident, Miss Olvera; please tell us if you were then seeking to get back as a performer in the Ringling show.

A. Before the accident?

Q. Yes. A. Just before the accident?

Q. The week before.

A. I never did, because I was working for the Ringling show, with one of their own shows, I was sent by them.

Q. You know that the Ringling show had one show, or performance, and the Al Barnes show had another, don't you? [53] A. That's true.

(Testimony of America Olvera Pollinger)

Q. You wanted to perform in the Ringling show, as distinguished from the Barnes, didn't you?

A. Not while I was already in the Barnes. I did not want to go over there, because I did not like the idea, but I was sent there, and they told me not to worry, because that was the same circus.

The Court: I don't think that is clear; you had better explain that. You said you did not want to go there, and they sent you somewhere else?

A. I did not want to go to the Al G. Barnes show.

Q. By Mr. Combs: You wanted to stay with the Ringling show, and perform in the Ringling show?

A. Yes.

Q. That was because the Ringling show was the No. 1 show? A. Not exactly for that.

Q. You kept repeatedly asking Mr. Valdo to return you to the Ringling show, after March, and up to September, 1937, didn't you? A. No.

Q. Didn't you ever write him and ask him to do that?

A. From the Al G. Barnes show?

Q. Yes. A. No, I never did.

Q. Didn't you ask him, on the day he came over, to see [54] your act, and see how well you were performing it? A. I never did act—

The Court: Finish your question.

Q. By Mr. Combs: Didn't you ask Mr. Valdo, when he came over to Anthony, Kansas that day from the Ringling show, which was nearby, to take a look at your act to see if he wouldn't return you back to the Ringling show? A. Why should he look at my act?

(Testimony of America Olvera Pollinger)

The Court: No, answer the question.

A. I did not ask him.

Q. By Mr. Combs: You did not ask him?

A. No, I did not.

Q. Isn't it true that Mr. Valdo came over to the Barnes show on that day for the sole purpose of seeing how well your act was going?

Mr. Marcus: I object to that as calling for the witness' conclusion.

Mr. Combs: I will withdraw the question. It does call for a conclusion.

Q. Didn't Mr. Valdo tell you, when he arrived on that day at Anthony, Kansas, that he came over for the sole purpose of observing your act, to see if you were good enough to go back to the Ringling show?

A. If I say yes or no, may I explain?

Q. Yes, you may. A. No. [55]

Q. Explain, please.

A. I was in the Ringling show before that, and my act could never be better than it was. I performed it with perfection. I did not learn the act in the Ringling show. I was already finished perfectly when I go there.

Q. But didn't you prefer to perform in the Ringling show, rather than the Barnes show, at that time?

A. At that time, no, sir; I was already there.

Q. You would just as soon perform then for the Barnes show as the Ringling show? I am not trying to infer that the Barnes was a different entity than Ring-

(Testimony of America Olvera Pollinger)

ling; I am asking you if you did not prefer to perform in the Ringling show at that time.

A. I would prefer to, yes.

Q. Valdo came over that day to see you perform, with a view to the possibility of your going back to the Ringling show? A. No.

Q. You did not communicate with him, and ask him to come over for that purpose?

A. During the season of the Barnes? No, sir.

Q. Didn't you write him, or communicate with him, and tell him you were not getting the right kind of service with the Barnes show, and you wanted to go back to Ringling?

Mr. Marcus: I object to that as not being the best evidence. Do you have such letter, counsel? [56]

Mr. Combs: Do you?

Mr. Marcus: I am not required to answer your question. I object to it upon the ground that it is not the best evidence.

The Court: Read the question, Mr. Dewing.

(Question read by the reporter.)

The Court: Overruled. You may answer.

A. No, sir.

Q. By Mr. Combs: Did you communicate with Mr. Cronin, the manager of the Barnes show, to that effect?

A. Yes, I communicated, but not to send me to Ringling show. I beg him, very many, many occasions to look after the property mens, and to give me a competent man to do so.

(Testimony of America Olvera Pollinger)

Q. I presume that's why you had your husband assist you in your act, isn't it? A. No.

Mr. Marcus: That is objected to upon the ground that what counsel presumes is not evidence.

The Court: Sustained.

Q. By Mr. Combs: Was that why you had your husband participate in your act? A. No.

Mr. Marcus: I object to that as calling for the witness' conclusion.

The Court: It has been answered.

Q. By Mr. Combs: Why did you have your husband take part [57] in operating your act?

Mr. Marcus: That is assuming he took part in operating her act.

Mr. Combs: The evidence shows he pulled the rope on the giant swing from which she fell, and likewise he raised her up when she went into her act.

The Court: It assumes she had him do it.

Mr. Combs: I will reframe it.

Q. Did your husband pull the rope when you raised up to your trapeze, and likewise on your giant swing?

A. Yes.

Q. At your request? Your answer is yes?

A. Could I explain?

The Court: Yes, you may explain. Answer yes or no. A. Yes.

The Court: Then you may explain.

A. Because there was nobody else there to do it. The mens who used to do it, sometimes, once they took me

(Testimony of America Olvera Pollinger)

out hanging on the line, out of the trapeze, and one of the men, he fell down; they did not know what to do; none of them.

Q. So, I take it, you had your husband do that because you preferred his manner of doing it to anyone else's, isn't that right? A. Yes.

Q. He had been doing that all the time you were performing with the Barnes show, hadn't he? [58]

A. Yes.

Q. From March to September? A. Yes.

Q. Then, I take it no one else ever did that for you on the Barnes show, is that right?

A. Yes, they did for me.

Q. Who else, Howard Mentz? A. Yes.

Q. I take it they did it only occasionally, is that right?

A. Yes.

Q. Your husband most of the time? A. Yes.

Q. That was at your insistence and request, wasn't it? A. Yes.

Q. Your husband got into the ring before you did, in your act, didn't he? A. No.

Q. About what time? About simultaneously with you—about the same time?

A. The very instant; we both stepped into the ring together.

Q. I take it he went direct to the rope and pulled you up, and you took the other end of the rope and up you went, is that right? A. Immediately, yes. [59]

(Testimony of America Olvera Pollinger)

Q. Then he stood, I take it, and held that end of the rope he had hold of, and pulled it over out of the way of the swing of your trapeze? A. Yes.

Q. The top of that rope was attached to the crane bar? A. It was.

Q. Was that attached to the clevis on the crane bar? A. No.

Q. Whereabouts on the crane bar? A. That is one of them.

Q. One of which? A. Them.

Q. This (indicating)? A. No.

Q. This? A. No, in between.

Q. Right in there?

A. There is a long steel cable attached to that which is around in the courtroom somewhere, with a big bunch of wire—I don't know if it is the proper word to say bunch.

Q. Cable; that's right.

A. Steel cable, about a yard, from that bar in between the clevis and the No. 8, from the extreme end of that yard of steel cable was a pulley with a rope, pulled me up.

Q. This cable ran down here about a yard?

A. Yes. [60]

Q. Alongside of this fall? A. Yes.

Q. This is a fall, is it not?

A. That is a fall line.

Q. It hung from this worn part of the crane bar between the eye hook and the clasp? A. Yes.

(Testimony of America Olvera Pollinger)

Q. At the end of that was a pulley through which the rope upon which you ascended on the trapeze ran?

A. Where it ran?

Q. Ran through the pulley? A. Yes.

Q. The other end of that rope ran out where your husband was?

A. No, there was a rope completely around.

Q. So when you were up on the bar your husband pulled the whole thing off to the side so it wouldn't interfere with the movement of your trapeze, is that right?

A. Yes, he walked out of the ring. He did not have to pull it; just have it in his hand and walked out. The whole thing would go with him.

Q. Then when you were ready for a little lift to start the big swing, he ran right over so that he could get hold of it, and give you two pulls? A. Yes.

Q. Then you started that big swing? [61]

A. Yes.

Q. In the center of this crane bar I observe an eye hook. A. Yes.

Q. What is the purpose of that?

A. For the purpose of the safety line.

Q. There was a safety line attached to this?

A. Yes.

Q. Is that the line you referred to, when you stated you practiced with a safety line? A. Yes.

Q. There was another type of safety line used on this trapeze when you were with the Ringling show?

A. Yes, there was one more.

(Testimony of America Olvera Pollinger)

Q. Wasn't that an invisible wire?

A. That was an invisible wire, yes.

Q. Which attached to this thing, and to your body, about your waist?

A. Yes.

Q. So that was a protection you had in the event you fell?

A. Yes.

Q. Instead of the net, when you were with the Ringling show?

A. Yes.

Q. But when you went to the Barnes show, I take it, you [62] did not use that?

A. Yes, I would say yes, but may I explain?

Q. Yes.

A. When I came to the Ringling show, as I never carry a net around, because it is too heavy for me, to carry around—I used to travel around then; I travelled from South America to Cuba; from Cuba I came to the United States, and it would be too much for me to carry. And then, as it was customary, we did not have to even ask the show to give us a net, provide us with a net, and there wasn't any purpose for me having a net.

Q. Is that your answer to that question?

A. I am explaining, sir.

Q. That little wire was too heavy to carry arround?

A. No, sir, it wasn't the wire.

Q. And as was customary—

The Court: She said the net was too heavy.

Mr. Combs: That was just the point; my question was: What did you do with the invisible wire.

A. Now I tell you what I did with the wire?

(Testimony of America Olvera Pollinger)

Q. Yes.

A. If I mention the wire, I have to keep on.

Q. Just about the wire; then we will get to the net later.

A. All right. The wire was for the purpose in case I would lose control and I may fall— [63]

Q. Beg pardon, Mrs. Pollinger; that is not responsive to my question. I want you to tell me what happened to the invisible wire that you had used on the Ringling show, when you came to the Barnes show.

A. Mr. Valdo told me—he talk it over with me—I will answer the way you want me.—Mr. Valdo told me take that off my body because the circus preferred to have the net for me instead of that wire.

Q. But you did not talk to Valdo when you were on the Barnes show, did you?

A. No, that was the Ringling show, the very first year, at Madison Square Garden.

Q. You took the invisible wire off the year before?

A. No, sir, not the year before.

Q. Several years before?

A. The very same year I came to Ringling Bros., Barnum & Bailey I slipped once, because there was some dirt from the horses was sticking to my shoe. You know that. Mr. Combs; I told you before, I slipped down on the trapeze. Well, I was protected by the line. Then Mr. Valdo used to watch my act very closely. He came to me and says "America, did you have a safety line on you which nobody could see?" I told him "Must I tell you?" He says yes. I told him "If you must

(Testimony of America Olvera Pollinger)

know, I have one." He says "Why do you do that?" I say "To protect myself. I am too high." He say "My dear girl, why don't you use a net. That's better; with a net it is much [64] better."

Q. All this, I take it, occurred in the Ringling show, in 1933? A. Yes, the very same year.

Q. Let us confine ourselves to the years from 1937 or 1936. Let us confine ourselves to that time. At that time did you have a net when you performed with the Ringling show, in 1936? A. Yes.

Q. Didn't you perform then without a net, on the Ringling show?

A. Never; after I took the safety line, the show gave me a net.

Q. When you went to the Barnes show you described to Mr. Cronin the sort of net you wanted?

A. I did not describe it to him.

Q. What did you say to him about it?

A. I needed a net.

Q. Just a net? A. Yes.

Q. Any kind which he would furnish you with, is that it? A. Any kind the circus have.

Q. The net they did furnish you was a satisfactory net to you, is that right? A. Yes.

Q. Did you tell Mr. Cronin how that net was to be [65] handled; where it was to be put?

A. Not to Mr. Cronin.

Q. Who did you tell that to?

A. Mr. Blackie Williams.

(Testimony of America Olvera Pollinger)

Q. You told him where to hold the net, is that right?

A. Yes, sir.

Q. Where did you tell him to hold it?

A. Under my trapeze, beneath me.

Q. And at all times? A. And at all times.

Q. Directly under the center of your trapeze?

A. And to move with me and watch me; keep constantly the eyes on me.

Q. You knew there were eight or ten men holding the net, didn't you?

A. Yes. I saw them. I did not know positively eight or ten.

Q. There were at least eight? A. Or ten.

Q. You say that you had these men move with you as you swung in the trapeze?

Mr. Marcus: She stated she told them to do that.

Q. By Mr. Combs: Did you tell these men, or tell their boss, Blackie Williams, to move as your swings progressed, move back and forth?

A. Not exactly the swings. Much better, if the swing [66] is here, there is the net; much better if the swing is here there was the net (indicating). And they should be alert in that sense too. In my language I would say "en garde."

Q. Then, if you moved they would move with you as you swung; you did not mean they would move their feet? A. What is that?

Q. You did not mean if the net was here they should run over here (indicating)?

A. They should do that.

(Testimony of America Olvera Pollinger)

Q. And if you moved they should run over here?

A. Not exactly run, because it wasn't such a big swing. That was like a fire department, when somebody jump from the building.

Q. Did anyone say to you what the effect of eight or ten men moving a net back and forth as you performed in the air would be on the audience? A. What?

Q. Did anyone say anything to you about the effect of that sort of thing on the audience in so far as your performance was concerned?

A. That wouldn't have any effect. I don't know.

The Court: Did anybody ever say anything about it?

A. No, sir.

Q. By Mr. Combs: Do you mean to tell us, Miss Olvera, that from March to September, when you were hurt, these men moved back and forth under your trapeze as you swung on it, [67] when you performed?

Mr. Marcus: I don't think the witness stated that they moved back and forth.

Mr. Combs: That is exactly what she said.

The Court: That is argumentative.

Mr. Combs: I will withdraw the question and re-frame it.

Q. Will you please explain exactly what the men handling the net did when you made the swing backward and forward on your trapeze? A. What they did?

Q. Yes. A. They didn't do nothing.

Q. They stayed right where they were?

A. Right where they were.

(Testimony of America Olvera Pollinger)

Q. They never moved their feet?

A. No, sir.

Q. Never at any time, from March to September, your testimony is that they never moved their feet?

A. I am not saying no, from March to September, because I never need them to move it, because it was the first time I fell.

Q. You don't mean to give the jury the impression—

The Court: I think you are asking about what their custom was when she was performing her act. She was referring to the very last act.

Mr. Combs: What I am trying to bring out is the fact [68] that they remained there stationary right in the center under the trapeze during the entire period of time.

The Court: I think that is quite apparent, but I think she is answering the question as to what she saw done the last day, the day of her fall. That is the way it occurs to the court.

Mr. Combs: Let me see if I can clear that up.

Q. The conduct of the men who handled your net, or the net that was used, was satisfactory during the entire period from February to September, or March to September, was it not?

Mr. Marcus: I object to that as calling for the conclusion of the witness.

The Court: That is not a conclusion, Mr. Marcus. She should know whether it was satisfactory to her. Objection overruled.

(Testimony of America Olvera Pollinger)

Q. By Mr. Combs: Was it?

A. Yes, because I never fell down; I never did need them to catch me.

Q. That is right, what I am trying to bring out is: You told them, or told their boss, to place that net, with its center right about directly under your trapeze when the trapeze was stationary, didn't you? A. Yes.

Q. Because that would cover the largest possible area of risk. A. Yes. [69]

Q. Your criticism of the manner in which they handled that net is directed solely to the fact that they did not move and catch you at the time you did fall, isn't it?

A. Yes, sir.

Q. In fact, isn't it true that if they had moved the net underneath you, during each performance, it would have diverted your attention, and have been an annoying thing to you in the course of your performance, wouldn't it? A. No, sir.

Q. Isn't it true that trapeze performers object to movement going on around underneath their trapeze during the performance?

A. I don't know what other trapeze performers do. I never did.

Q. How far from the outer end of the net did you fall? A. Scarcely a foot out, sir.

Q. When you fell, I understand you struck the back of one of the men holding the net?

A. Yes, I did.

Q. These men held the net in their hands?

A. A little closer to their body, Mr. Combs.

(Testimony of America Olvera Pollinger)

Q. Something like that?

A. Something like that.

Q. Indicating with my forearms extended perpendicularly to my body. And the loops of the net were around the wrist, through the palm of the hand? [70]

A. Yes.

The Court: In that position the outer edge of the net would be about eight or ten inches from your body.

Mr. Combs: It would depend on the length of the forearm.

The Court: I am looking at you.

Q. By Mr. Combs: How far from the end of the fist would the net proper be?

A. I can't say exactly.

The Court: The net, Mr. Combs, came to the outer edges, with the exception of room enough there for the men to hold the rope, which was around the net, isn't that about correct?

Q. By Mr. Combs: I take it then it was something like that, isn't that correct? A. Yes.

Q. It was like that (indicating)? A. Yes.

Q. Indicating a rope around that, and these ends of the rope were attached to the net, and the canvas started approximately an inch or two beyond the hand, did it not? A. Perhaps.

Q. That would make the distance, if my forearm were typical, of something a little better than a foot from the middle of the body to the net, isn't that right?

A. Yes.

(Testimony of America Olvera Pollinger)

The Court: I don't believe it would be a foot from the front of the net. [71]

Mr. Combs: From my body to the net, isn't that right?

The Court: Anyway, they held the net out in front of them.

Mr. Combs: This looks to me like it was about 18 inches.

The Court: It isn't important.

Mr. Combs: Let us get it right. One foot to this point, and an additional four inches to the end of my finger.

The Court: You are getting your hands a little more extended.

Mr. Combs: It looks to me like it was about 18 inches, anyway.

The Court: It looks to the court less than a foot.

Mr. Combs: Let us get it exactly right, because I wouldn't want the record to show that, your Honor, because I think that is an important part in this lawsuit.

The Court: Mr. Marcus, go up and help Mr. Combs.

Mr. Combs: Have you got it? Put the measure on my body next to the elbow bone.

Mr. Marcus. What does the record show with reference to where the measurement is to be taken on your body?

Mr. Combs: The end of my elbow. Do you feel that? This is the end of the elbow.

Mr. Marcus: I am asking about the record; where is it to be taken from?

(Testimony of America Olvera Pollinger)

The Court: Help Mr. Combs to take any measurement he wants. See how long his elbow is. [72]

Mr. Combs: From my elbow bone to the end of my wrist is one foot, is it not?

Mr. Marcus: Yes.

Mr. Combs: Correct, counsel?

Mr. Marcus: Yes.

Mr. Combs: Will you measure from my wrist out to where these fingers are? I will put the hand as tightly together as I can.

Mr. Marcus: Four inches.

The Court: Measure from that part to the front of his body.

Mr. Marcus: About 11 inches.

Mr. Combs: Let us get that again.

The Court: The court will take a recess at this time. During this recess, gentlemen, bear in mind the admonition of the court.

(Short recess.)

(Stipulated that all the jurors were present and in their places.)

Q. By Mr. *Marcus*: Mrs. Pollinger, these net men did not do anything different on the night, or on the occasion, that you fell than they had been doing all the season, is that right? A. No.

Mr. Marcus: If they did anything different, assumes that they did do anything. I object to it upon that ground. [73]

Mr. Combs: They must have done something.

(Testimony of America Olvera Pollinger)

The Court: I don't think that objection is good, Mr. Marcus. Read the question, please.

(Question read by the reporter.)

Mr. Marcus: I object upon the further ground that it calls for the conclusion of the witness.

The Court: It does call for the conclusion of the witness. Objection sustained. The answer may go out.

Q. By Mr. Combs: The net was handled on the occasion of the day of your fall exactly the same as it had been the preceding months of your employment, is that right? A. Yes.

Q. Will you explain once again to the jury how you struck, and where you struck, if you can, the man holding the net, on your fall?

A. Yes, sir, when I came down I struck one of the mens, right here in his shoulder, but it was in between the two men.

The Court: You are referring to your right shoulder?

A. Yes, right here; not on the shoulder. I struck in here.

The Court: You changed around to your left shoulder.

Q. By Mr. Combs: Was it his right shoulder?

A. I try to show you. I don't remember.

Q. By the Court: You don't know whether it was the right shoulder? A. No, I don't. [74]

Q. But it was the shoulder, and outside of the arm?

A. Yes.

Q. By Mr. Combs: Would you be able to say how far from the net you were at that point?

A. Scarcely a foot.

(Testimony of America Olvera Pollinger)

Q. Scarcely a foot?

A. Or about a foot. Of course, you see—can I explain?

Q. Yes.

A. It would be very difficult for me to guess how far it is from here to here, if I haven't got a rule. I just imagine. From the fall I break my back. I can't remember exactly how much it was.

Q. I take it you are only attempting to make a rough estimate of that distance? A. Yes.

Q. Did you tip these net men for their services during the season?

A. Sometimes I would give them a package of cigarettes; sometimes I would give them a dollar.

Q. You would give them money quite regularly during the season, and tip them?

A. Not regularly.

Q. You did tip them during the season?

A. Not during the season. I said, sometimes I would give them a little something; sometimes I would give a necktie. [75]

Q. Or some money?

A. Not always. A dollar or something.

Q. After this accident you remained with the show of your own volition, did you not?

A. What is that, volition?

Q. You wanted to stay with the show, didn't you?

A. If I wanted to stay with the show?

(Testimony of America Olvera Pollinger)

Q. I mean, you travelled with the show because you wanted to be with the show rather than in a hospital, isn't that right? A. I was in bed, yes.

Q. That was because of your own desire; you wanted to be with the show? A. Yes.

Q. The Ringling people, or the Barnes people did not compel you to go along with the show? A. No.

Q. You were injured the year before, when you were with the Ringling show, on account of a fall, were you not? A. When?

Q. In 1936. A. No.

Q. Didn't you fall and injure both ankles?

A. I had an accident. Somebody dropped me down. That was 1935.

Q. You broke both of your ankles, didn't you? [76]

A. No.

Q. How did you injure yourself?

A. My hands.

Q. You broke your hands?

A. Yes, sir, I broke my nose.

Q. You also had an automobile accident subsequent to your injury with the Barnes show, did you not?

A. If I say yes I got to explain.

Q. You may. A. Thank you.

Q. You may always explain your answer.

A. I did not have exactly an automobile accident. There was some gentlemen. We had my husband's car, but to me, I couldn't call it an accident because nothing happened to me.

(Testimony of America Olvera Pollinger)

Q. When you first started your act on the night—was it the 11th of September you were injured, or the 12th? A. I think it was the 12th.

The Court: It says the 11th.

Mr. Marcus: I think that date was erroneously put in. Anyway, we will understand it is always referred to the day of the accident.

Q. By Mr. Combs: On the 12th did you look up and see if the hooks of your trapeze and its equipment were in place, before you started your act?

A. No. [77]

Q. I take it then that the first intimation that you had that the hook was not in place, the figure 8 hook, was when you looked up, virtually at the end of the first section of your act, is that right? A. I what?

Q. The first realization, or thought, or idea, that there was anything wrong with the figure 8 hook—

A. Do you mean when did I see it?

Q. I will withdraw the question. The first you had any idea that there was anything wrong with the figure 8 hook was when you looked up almost at the end of the first section of your act?

A. The first idea when the hook was overlapped was when I did the last exercise and fixed my point of view on the crane bar, then it shot out.

Q. At that particular moment it was then in the process of falling out, was it? A. Yes, sir.

Q. That swing you were making at that particular time, about how many feet was it?

A. It would be about four feet to the front, four feet to the back.

(Testimony of America Olvera Pollinger)

Q. Wasn't it more than that? A. No.

Q. This fall was 12 feet long, was it not?

A. Yes, sir. [78]

Q. Did you swing out a long way out so that your body was almost straight out from the trapeze?

A. No. Can I explain why?

Q. Yes.

A. All right. My apparatus was always set up in between the flying act. The flying act is the girl or boy, or two gentlemen and a lady who swing from the platform to the hands of the catcher, the hands of the catcher of the man who hangs on his knees. There is an iron apparatus in the platform. If I would swing further than what I have told you I would hit my knees against the apparatus, or would hit the large platform.

Q. Do you mean this trapeze can only swing four feet from the center of that ring?

A. No, sir, I can swing further, but not with the flying act.

Q. You are sure you did not swing back about 14 feet, overall; 7 feet out one way, and 7 feet out the other?

A. Yes, I am sure I didn't swing 14 feet.

Q. When you swung sideways with the trapeze, I take it that the swing was somewhat like this, back and forward, like this, wasn't it? A. Yes, exactly.

Q. About how far backwards and forwards did you swing in that?

A. About three feet in front and three feet back from [79] the center.

(Testimony of America Olvera Pollinger)

Q. Three feet each way?

A. I always want to explain. Can I?

The Court: Do you have to explain it? You said about three feet each way.

A. Yes.

Q. By Mr. Combs: You are sure you did not swing four feet each way?

A. I thought you were going to refer to that.

Q. Why did you think I was going to refer to that?

A. It would be impossible for you to understand, if I don't explain.

Q. Go ahead and explain.

A. The front of me is a bar like this, and I have got to swing just enough so that the bar won't go too much under the clevis. If I swing this way, the trapeze was still parallel, even, but if I swing further down the trapeze will point down, like that.

Q. Are you sure you did not swing four feet out each side? A. It might be four feet.

Q. It might be four feet?

A. It might be three and a half or four.

Q. When you did this spinner, or whirligig, where did you fix your point of vision?

A. I fixed my point of vision right straight to my [80] body, which would be about the beginning of the circle of the ring; straight this way, and about to the end of the table, a little before. There is where my face is, straight about there, that should be my point of view.

(Testimony of America Olvera Pollinger)

Q. And that point was some object on the ground, wasn't it? A. Sure.

Q. Something on the ground?

A. Yes, it would be, as I say, the start, the beginning of the ring.

Q. The ring curves?

A. Yes, sir, the ring curves.

Q. You, I take it, do not know then of your own knowledge when the 8 hook became overlapped, do you?

A. No, sir, I don't.

Q. When you fell down you fell out of the front of the trapeze, did you not?

A. No, to one side.

Q. To one side?

A. To one side; this side.

Q. The left or right? A. The right side.

Q. I take it that that was also the side that the figure 8 hook was tangled up on? A. Yes.

Q. You do not know when the crane bar of your equipment [81] was put in place, do you?

A. It was put in place with the trapeze at the time, all together.

Q. Wasn't the whole trapeze hung in the big top before the performance?

A. Before the performance?

Q. Before the show even was put on?

A. It was put some place at that time. I might not know, because I wasn't in the circus when the tent was up.

(Testimony of America Olvera Pollinger)

Q. I take it on that occasion, or any other occasion, you did not know when the crane bar was hung to the bull ring?

A. The crane bar is always attached, as it is here, and when they put that up it has to go up.

Q. Please answer the question, America.

A. Yes.

Q. You did not know on that occasion, or any other occasion, when the trapeze was put in place, did you?

A. No, sir.

Mr. Marcus: You are confusing the crane bar with the trapeze.

Q. By Mr. Combs: When the crane bar was put in place? A. Yes.

Q. Is that the crane bar with a clevis?

A. Yes.

Q. The trapeze goes up with the crane bar? [82]

A. Yes.

Q. It is hung to the bull ring on the main post or pillar of the tent?

A. I don't know what bull ring means.

Q. Did this figure 8 hook ever get tangled before this date, September 12, at Anthony, Kansas?

A. No.

Q. It never had before in your entire performance?

A. The 8 hook?

Q. Yes. A. No.

Q. It always hung perfectly when you performed?

A. Yes, sir.

(Testimony of America Olvera Pollinger)

Q. You say it was dark in the top of the tent at the time when you came out for your act, is that right?

A. Yes.

Q. How do you know that?

A. Because when there is no light there you have to know there is dark.

Q. Was that the manner in which you knew that fact?

A. Yes.

Q. You didn't look, did you?

A. Don't try to embarrass me, because I tried to explain; you don't have to know. You have to see it. I saw it was dark.

Q. You did not look up into the top of the tent at the [83] time, did you?

A. No. It was dark all over.

Q. Dark all over the top of the tent?

A. Yes.

Q. Isn't it true there are lights on in the tent at all times during performances?

A. Not in the afternoons.

Q. When the performances are going on?

A. Not in the afternoon at that time.

Q. On this particular afternoon there were no electric lights burning in the tent?

A. No, sir, not only that particular afternoon; the lights go on just when the dynamos begin going on. They never go in the afternoon, I mean, at that time.

Q. What time of day did this accident take place?

A. Around 4:00 o'clock.

(Testimony of America Olvera Pollinger)

Q. Do you know when it gets dark in Anthony, Kansas, about September 10th?

A. Honest, I wouldn't be able to say about what time.

Q. Your testimony is positive, however, that there were no lights on in the tent at this particular time?

A. Yes.

Q. How did it happen you were able to see the figure 8 hook so clearly when you looked up there to gain your point of vision?

A. Because I got between there and my body, five feet [84] three inches high. The lines, suppose they are 12 feet from this, how many feet would my eye be from the crane bar? It wouldn't be such a distance.

Q. So your explanation of that answer is that you were a great deal closer and you were able to see the 8 hook because you were nearer to it, notwithstanding the dark shadows up there, is that it?

A. I beg your pardon?

Q. I will withdraw the question. I believe you testified on your direct examination that your husband lowered one side of the crane bar to compensate for the shortness of the line on account of one of these hooks?

A. He never did, sir.

Mr. Marcus: You are assuming, counsel, that she made such statement.

The Court: You had better refer to the record. She said she did not say it.

Mr. Marcus: The reporter may look it up. You don't mean to say, counsel, that it is there, do you?

(Testimony of America Olvera Pollinger)

Mr. Combs: I mean to state that I believe that I heard this witness so testify. I am quite sure it will be found there, counsel.

Q. I take it then that your husband did not do anything to compensate for the crane bar, or for the shortness of one of those lines on account of the figure 8 hook being hooked up, is that right? [85]

Mr. Marcus: That is assuming facts not in evidence, that she so testified her husband did anything, least of all, did something to compensate.

Mr. Combs: I want to say this, that there is a very distinct and positive recollection in my mind that that is her testimony. I wrote it down in quotes. If I am wrong I will be glad to acknowledge that error, and be glad to say so. But the question I have asked I think is a proper question. I want to find out what the true fact is, regardless of whether I am right or wrong in my impression of her testimony.

The Court: Read the question, please, Mr. Dewing.
(Question read by the reporter.)

The Court: Is there any objection? This doesn't refer to her testimony; it refers to the fact.

Mr. Marcus: It is assuming, your Honor, in the first place, that there was something to be compensated for there; something that was out of balance to her knowledge, that her husband did.

The Court: In any event it calls for the conclusion of the witness. Mr. Combs, you don't mind the court suggesting something?

Mr. Combs: Not a bit.

(Testimony of America Olvera Pollinger)

The Court: In your questions you have used the phrase a number of times "I take it" such and such. Just ask the question directly, and I think it will be more definite.

Mr. Combs: I will withdraw it and reframe it. [86]

Q. Miss Olvera, you didn't observe anyone make any adjustment in the crane bar to compensate for one of those lines being shorter than the other, on account of the figure 8 hook being hooked up, did you?

Mr. Marcus: I object to that as assuming that she had knowledge at the time that the line was not level, or that she had knowledge that something was done to compensate for the line being out of level.

Mr. Combs: Just answer the question; if she saw anybody do anything.

Mr. Marcus: Ask her that question.

Mr. Combs: Did you?

The Court: Read the question.

(Question read by the reporter.)

The Court: Before the court rules upon your objection, Mr. Marcus, the court admonishes you not to tell Mr. Combs what to do. If there is any objection you have to his method of examination, you make your objection to the court. The court does not expect to have any controversy here between counsel. The objection is good. Sustained.

Q. By Mr. Combs: Miss Olvera, if your figure 8 hook were hooked up in some manner out of place it would shorten the line from the point of this eye hook down to your trapeze bar, would it not?

A. Yes, positive.

(Testimony of America Olvera Pollinger)

Q. But when you came into this performance, I under- [87] stand you looked at your trapeze bar and determined it to be exactly level?

A. Perfectly level.

Q. In fact, you could not have performed any of your act if it had been in the slightest degree out of level, isn't that true?

A. No, I could not.

Q. Your action requires the utmost of precision and accuracy in foot placement and the placement of your hands and your body, doesn't it?

A. What?

The Court: Read the question, Mr. Dewing.

(Question read by the reporter.)

The Court: Do you mean act or action?

Mr. Combs: I mean act.

The Court: Reframe the question.

Q. By Mr. Combs: Your act requires very great precision and accuracy of movement of your feet and your body, doesn't it?

A. If I don't get it, can I say what I have to do?

The Court: Do you understand the question?

A. No, sir.

Q. By Mr. Combs: The performance of your act requires very accurate placement of your feet and your body and hands and of your trapeze, doesn't it?

A. My trapeze, yes. If my trapeze is perfectly level [88] and steady, I mean guyed tight, I can perform my act.

Q. You can perform your act?

A. Yes, that is why I need to have my lower bar perfectly level.

(Testimony of America Olvera Pollinger)

Q. If your lower bar were not perfectly level, you would know it at once when you stepped on it?

A. Yes, instantly.

Q. That is likewise true, if one end of your bar swings out further than the other end? A. Yes.

Q. You would notice it at once? A. Yes.

Q. In this particular case at Anthony, Kansas, your bar did not swing out on one side ahead of the other, did it? A. No.

Q. Yet, according to your statement, one of these lines was shorter than the other, wasn't it?

A. Now is what I know, but if I know at the time, sir, no money in the world will I have done it; would I go up.

Q. Isn't it true, Miss Olvera, that if one of these lines were longer than the other line, the longer side, on a swing even of 8 feet backward and forward, would swing out ahead of the other?

A. No, not if the lower bar were perfectly level.

Q. Are you sure that the existence of the level condition of the lower bar would affect your swing? [89]

A. Absolutely.

Q. And you state, if one of these lines were two inches shorter than the other— A. Yes.

Q. —that the shorter side would swing exactly the same length, on a swing out, as the longer side, is that right?

Mr. Marcus: That assumes a fact not in evidence. It asks her for an expert opinion; he has not assumed, in his assumed case, or placed Miss Olvera on the bar,

(Testimony of America Olvera Pollinger)

because her weight was on the bar at the time she was swinging, which would make a lot of difference.

Mr. Combs: It wouldn't make any difference at all.

Mr. Marcus: I submit, your Honor, that it assumes facts not in evidence; not based on a hypothetical question as the facts disclosed from the evidence here today.

The Court: I think that all of this testimony concerning the act places Miss Olvera on the bar. That was what you intended, wasn't it, Mr. Combs?

Mr. Combs: Certainly, your Honor.

Mr. Marcus: If he did, your Honor, I don't believe the question includes that statement.

Mr. Combs: We will just amend it to include it then.

Mr. Marcus: Thank you.

Q. By Mr. Combs: Referring to the time you were on the bar, if one line supporting that bar was shorter than the other line which is on the bar, isn't it true that the [90] longer side will swing out a little further than the shorter side?

A. No, because I am there extending out, and the lower bar is level, perfectly level, and I am working with a balance.

Q. Do you mean to say you can control that swing by the use of your hands and your body?

A. I don't mean to say I can control it. I control my trapeze during my act, but the trapeze did not swing to one side out more than the other.

Q. On this particular occasion you did not have to use your body to control it from swinging out further on one side than the other? A. No.

(Testimony of America Olvera Pollinger)

Q. Because both sides swung out perfectly level?

A. No.

Q. Because neither side swung ahead of the other?

A. No.

Q. If one had swung further than the other, with the precision of your act you would have known it?

A. Yes.

Q. Even if it be an inch or two? A. Yes.

Q. The answer is yes? A. Yes.

Q. When you use the sideways swings with the bar, on [91] that occasion did the bar with the longer fall line swing out a little bit further than the bar with the shorter? A. No, sir.

Q. Exactly the same distance?

A. Perfectly the same distance.

Q. Had it done so you would have noticed that?

A. Yes, sir.

Q. Isn't it true, Miss Olvera, that where a bar is suspended level on two lines, one shorter than the other, the arc or swing of the longer line will be a little greater than that of the shorter?

A. Not if the swing is a short distance, and what is hanging there is extremely heavy.

Q. You believe that the weight of the object supported alters the degree of the swing of this arc, is that right?

A. I don't mean that. I mean this: Here is the same thing, and this other the same thing. All right. We support it from the bar and we lower this further, and we swing it. It never goes out.

(Testimony of America Olvera Pollinger)

Q. That's right, but supposing the one on your left were longer than the one on your right.

A. I beg your pardon?

Q. Supposing the one on your righthand were longer than the one on your left, isn't it true that the arc described by the point constituting the star, in fact, on each side of this trapeze, would be a greater arc, or longer arc than the [92] one on the shorter side?

A. It would be just the same, if it was on the right or was the left, as long as the top was out of level and controlled the level of the lower one.

Q. I take it your answer—withdraw "I take it." Your answer then is no, the swing on both sides would be the same, is that it? A. Yes, sir.

Q. And likewise that is your answer respecting the swing sideways; they go out the same distance on each side? A. Yes.

Q. Notwithstanding one of these lines was longer than the other, because the figure 8 hook is hooked up, is that right? A. Yes.

Q. I want to be very clear on this subject: When you looked up at that crane bar did you see anything wrong with the clevis or the attachment by which the crane bar was hooked up to the big top?

A. When I performed my last exercise, yes, I did.

Q. What was wrong with the clevis?

A. The clevis, oh, nothing was wrong with the clevis

Q. Nothing at all?

A. No. I mean the other hook was out of place, the hook was supposed to be like my hand, and instead

(Testimony of America Olvera Pollinger)

of the clevis being here it was in another little curve, which is [93] on the side.

Q. The clevis did not hang right in the middle?

A. Yes, in the middle. Presume my hand is the hook, and instead of hanging here it was hanging here, because the hook was made this way, and has another little curve like that, and the clevis was hanging here instead of here, and with the whole weight, and the tightness of the guy line, it kept it in place, and then when the figure 8 hook was down I realize the trapeze, if this hook really wasn't in the normal position, would make the trapeze come further down.

Q. That caused a drop in the level of the trapeze of how many inches on one side?

A. Sometime ago I said what I saw. I told you it would be four inches. The way I saw was about five or six.

Q. Five or six inches? A. Yes.

Q. Which end of the crane bar was the clevis hooked up on out of place?

A. I don't know now which end, because they look the same.

Q. You looked up there and saw it? A. Yes.

Q. When you looked up for your fixed point of vision, tell us what you saw.

A. I saw it, in the trapeze, on the right side.

Q. Was it the same side the figure 8 hook was hooked up [94] on? A. Yes.

Q. It was? A. Yes.

(Testimony of America Olvera Pollinger)

Q. Your entire first section of your act took about three minutes, is that right? A. About.

Q. You had practically completed the same when this accident occurred, is that it? A. Yes.

Q. During that time you did certain stationary acts on the bar, such as picking up a handkerchief, and standing on one leg, or both knees, pausing, changing your position from foot to back, and twisting your legs?

A. Yes.

Q. In addition to that you did certain acts in motion, comprising the swinging act three or four feet out on each side? A. Yes.

Q. And that swing act you estimate is four feet out in front and four feet out in back? A. Yes.

Q. In addition to that you spun the trapeze around so it wound up the falls completely behind your back, and then you allowed it to unspin and brought it to a stop with your body, is that right? [95] A. Yes.

Q. During all of these performances nothing occurred in relation to the figure 8 hook; it remained in the same position it had been in when the trapeze was erected, is that right?

A. Nothing occurred in the first part of the act.

Q. Your bar remained level, despite all of this movement; the figure 8 hook remained where it was when the trapeze was raised? A. Yes.

Q. When you fell you are sure you didn't lose consciousness for a single moment; you had complete consciousness up to the time you were removed to the hospital and given an anesthetic, is that right?

A. Absolutely, sure.

(Testimony of America Olvera Pollinger)

Q. You looked up at that time, and looked at the trapeze? A. Yes.

Q. And made certain remarks to which you have testified? A. Yes, sir.

Q. How long did you remain there immediately after the fall? A. In the ring?

Q. Yes.

A. Heavens, not even a second. I hardly struck the earth when my husband ran and picked me up.

Q. I will ask you whether or not you testified in the [96] former trial in this matter, on or about the 16th of January, 1940, in the afternoon of that day. Calling your attention, counsel, to page 228 of the transcript, the question beginning there, and ending with folio 254, did you testify at that time and place—

Mr. Marcus: I stipulate that she so testified.

Mr. Combs: You stipulate that she testified as follows; I will read it?

Mr. Marcus: Yes, go ahead.

Mr. Combs: "Q—When you struck the ground, Miss America, were you in the ring?

"A—I fall right on the shoulders of a man who was holding the net and his back was right inside the ring." Now, I will ask you, reading from page 234, folio 292, as follows:—would you stipulate she testified?

Mr. Marcus: Let me see what you want her to testify to. I haven't any objection to reading that testimony, but I see no purpose in it.

The Court: Ask your question.

Q. By Mr. Combs: Did you testify at that time and place as follows—

(Testimony of America Olvera Pollinger)

Mr. Marcus: I submit, your Honor, that is not a proper method of impeachment. I ask that the matter be handed to the court, to determine whether such question and answer do impeach the testimony of the witness.

Mr. Combs: I suppose technically that I would have to [97] take the original—

Mr. Marcus: I am not objecting on that ground. Show it to the court.

The Court: That, as the court recollects, is not contrary to the testimony now.

Mr. Combs: She said three feet.

The Court: She said possibly four.

Mr. Combs: May I read it for whatever weight it has?

The Court: You may read it. The reading of it should not have any weight, because the court's ruling would be that it was not at variance with her testimony here; but for the purpose of the record you may read it.

Mr. Combs: It seems to me the question of weight would be a question for the jury.

The Court: No, that is a question of impeachment. The court has to rule whether or not it is an impeaching question. For the purpose of the record you may read it, laying your foundation.

Mr. Combs: I didn't like to be persistent, your Honor—

The Court: The Court said you may read it.

Mr. Combs: The only question is, the remarks of the court: It may be read to the jury, but I believe there is no weight to this. That is a question for them.

The Court: It is, if the court permits it to be answered.

(Testimony of America Olvera Pollinger)

Mr. Combs: "Now will you proceed and tell us from the [98] point where you started swinging sideways and continue from where I interrupted you.

"A—I was swinging this way when you interrupted me. Sideways, this way (indicating).

"Q—Now let me stop you a moment there. By sideways, you mean you swung on this bar back and forth parallel with the crane bar, is that it?

"A—Yes.

"Q—What was the distance of that swing, approximately?

"A—Approximately from here, from the start it goes about four feet.

"Q—About four feet on each side, or a total swing of about 8 feet?

"A—One time and another time, no more than 8 feet.

"Q—Over all, the whole swing, 8 feet approximately?

"A—I don't understand the word 'overall.'

"Q—Well, all right. Four feet to one side and back over four feet on the other side, is that right?

"A—Yes."

The Court Is there any objection, Mr. Marcus, or not?

Mr. Marcus: No, I am not objecting to it.

The Court: Did you so testify?

A. Yes.

Mr. Marcus: I stipulated in the beginning that she so testified, your Honor. The witness indicated that I should approach her. [99]

The Court: She desires to speak with you? She has a right to do that.

(Testimony of America Olvera Pollinger)

Mr. Combs: I don't seem to find the matter I am looking for, your Honor. I am satisfied it is in here. I believe that will be all the cross examination at this time.

The Court: Do you indicate that you would like to cross examine later? You had better finish the cross examination now, if there is to be any more.

Mr. Combs: It would only be if I asked leave of court. I did not mean to put a joker to it, so that I could come back later.

The Court: Any redirect examination?

Redirect Examination

Q. By Mr. Marcus: Miss Olvera, you testified that so far as you knew the net was handled satisfactorily until the date of the accident. Do you remember that?

A. Yes, sir.

Q. Did you have any occasion to require the services of these net men at any time prior to the date of the accident?

Mr. Combs: That is objected to as calling for the conclusion of the witness. The testimony is they did act during all that period of time.

The Court: Do you mean by that, did she fall at any other time?

Mr. Marcus: That's right.

The Court: Ask her. [100]

Q. By Mr. Marcus: Did you ever fall at any other time? A. No, sir, I never did.

Q. Did they have to render any service to you with reference to this net prior to the date of the accident?

A. No.

(Testimony of America Olvera Pollinger)

Mr. Combs: I object to that as calling for the conclusion of the witness, and ask the answer be stricken.

The Court: The answer may go out. Objection sustained.

Q. By Mr. Marcus: When you stated, Miss Olvera, that the services of the net men were not satisfactory—

A. The day I fell.

Mr. Combs: May we not have an opportunity to object?

The Court: Yes. When there is an objection, Miss Olvera, you must wait until the court rules on the objection.

Mr. Combs: I object to that as argumentative and calling for the conclusion of the witness.

The Court: I think this is proper redirect. Mr. Combs opened up that line by asking her if it was satisfactory. I think it is proper redirect. Objection overruled. The answer may stand.

Q. By Mr. Marcus: That was the first time that you required their services, as net men?

Mr. Combs: That is a leading question.

Q. By Mr. Marcus: When was it that you required their services as net men?

Mr. Combs: I object to that as calling for the conclusion [101] of the witness, and not proper redirect.

The Court: Objection sustained.

(Testimony of America Olvera Pollinger)

Mr. Marcus: I think that is all, your Honor.

Mr. Combs: No further examination of this witness.

(Whereupon an adjournment was taken until 10:00 o'clock a. m., the following day, Wednesday, January 5, 1944.) [102]

Los Angeles, California, Wednesday, January 5, 1944;
10 A. M.

(Stipulated the jurors were present and in the box.)

Mr. Marcus: Your Honor, at this time I am going to read the evidence of Dr. Steele Stewart, who happens to be in government service in the South Pacific, so I have been advised. Counsel has agreed to it, and counsel and I will read the questions and answers. Counsel will read the questions, and I will read the answers. This is Volume 3 of the transcript, page 276. May I make a statement to the jury as to what we are doing?

The Court: Yes, you may.

Mr. Marcus: One of the doctors in this matter, who testified on behalf of Miss Olvera, is in the government service, and unable to be here, and we are reading his testimony from the prior trial in this case.

The Court: In the absence of the doctor you are giving the testimony by reading the transcript of his testimony taken at the other trial?

Mr. Marcus: That is correct, your Honor.

DR. STEELE STEWART,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am asking these questions on behalf of the plaintiff, but Mr. Combs is taking my place, and I am acting as the doctor. (Questions read by Mr. Combs; answers read by Mr. Marcus): [103]

"Q—Doctor, what is your business or profession?

"A—Orthopedic surgeon.

"The Court: Your name, Doctor?

"A—Steele Stewart.

"Q—By Mr. Marcus: You practice in the city of Los Angeles?

"A—Yes, sir.

"Q—What is your specialty, Doctor?

"A—Orthopedic surgery.

"Q—What qualifications do you have as such orthopedic surgeon?

"A—Well, I graduated from the University of Pennsylvania in 1918; spent thirteen months in the Peter Bent Brigham Hospital at Boston; six months in the Childrens' Orthopedic Hospital in Boston, in orthopedic surgery; in the Massachusetts Hospital as orthopedic surgeon; began practice here in the early part of 1922; been on the staff of the Childrens' Hospital as an orthopedic surgeon ever since; on the staff of the General Hospital here five or six years, until I resigned; the same in the San Bernardino Hospital; on the staff of the Cedars of Lebanon Hospital; at the present time I am Assistant Professor of Orthopedic Surgery at the University of Southern California.

(Deposition of Dr. Steele Stewart)

"The Court: You don't need to proceed.

"Q—By Mr. Marcus: Did you examine Miss America, Doctor?

"A—I did.

"Q—Did you examine the X-rays? [104]

"A—I did.

"Q—Did you examine these X-rays here that I show you? For the purpose of the record, they have been marked Plaintiff's Exhibits 6 and 5."

Mr. Marcus: They have been marked Plaintiff's Exhibits 6 and 5 in the former trial. May we introduce these X-rays? I presume they will be marked in this proceeding?

Mr. Combs: No objection.

The Court: They may be received.

Mr. Combs: Some of them are ours.

Mr. Marcus: Let them both go in.

The Clerk: There are three exhibits here.

The Court: Which ones are you offering?

Mr. Marcus: Plaintiff's Exhibits 5 and 6.

The Court: Which one do you want marked first?

Mr. Marcus: I think February 5, your Honor.

The Court: It may be received as Plaintiff's Exhibit No. 3 in this case. The other one will be Plaintiff's Exhibit No. 4.

(Deposition of Dr. Steele Stewart)

"A—I examined that group (indicating) and I examined that group (indicating).

"Q—Doctor, did you perform a physical examination on the body of America Olvera?

"A—I did.

"Q—When was the examination made, Doctor?

"A—The 13th of this month. [105]

"Q—January, 1940?

"A—Yes.

"Q—Will you relate the history she gave you of the case at that time?"

Mr. Combs: Do you withdraw that question?

Mr. Marcus: Yes.

Mr. Combs: Line 23, is that right, Mr. Marcus, for the next question?

Mr. Marcus: Yes.

"Q—Doctor, what did you discover at the time you performed your physical examination?

"A—I noticed that the patient walked with crutches; she dragged her right foot when she walked, and that she stood with slight assistance from her husband, without the crutches for a few moments. There was a swelling in the small of the back, over the spine; and on the examining table the patient's hips did not permit the ordinary range of motion that we see in the normal individual, and she made complaints of pain when the legs were moved to the extreme, and she was unable to lift her right thigh from the table when she was in a sitting position. She was unable to straighten her right leg

(Deposition of Dr. Steele Stewart)

when in a sitting position. She was able to bring her great toe—I mean, move her foot to the side of her great toe to a slight extent. She could move the toes a little bit. She exhibited an area of anesthesia to stroking with cotton. [106]

“Q—What does that ‘anesthesia’ mean, doctor?

“A—Anesthesia means she could not recognize when she was touched with a wisp of cotton over the front of her thigh, from the level of her pelvis down over the leg and foot.

“There was an area that extended irregularly along the back of the leg in which she was able to so recognize the cotton. We stuck her with a pin a great many times over this same area; for the most part she was unable to tell where it stuck her. There were a few places that she could recognize the fact that the pin did stick her; most of the time she gave no indication of having been stuck with a pin, though.

“Her reflexes, and by that we mean the reaction of a part of the body to stroking or a blow with a hammer, the involuntary reactions of the body to that stimulus showed that the reflexes were different on the right and left side; and on the right side the muscles that reacted from that blow, the knee joint, were not the ones that ordinarily reacted. At the ankle, both jerks were present, but in unequal degree.

“Q—Doctor, you examined the X-rays, did you not?

“A—I examined the X-rays.

“Q—I wonder if you would be kind enough to read those to us, please, and tell us what you discovered from them. Give the dates that they bear, please. [107]

(Deposition of Dr. Steele Stewart)

"A—Starting with Plaintiff's Exhibit 5, which is dated 5/13/38, it shows a compressed fracture of the first, second and third lumbar vertebrae. The lumbar vertebrae are those portions of the spine which make up the small of the back and below the rib cage and above the pelvis. There are five of them. That is a posterior view of the same general area, and it shows some evidence of bone reaction between the first lumbar and the twelfth dorsal.

"Q—That second one, the posterior view, doctor, that was taken on the same date? Does it bear the same date?

"A—5/13/38. It is the same date. It is practically an identical picture with the previous one.

"The next one, taken 7/27/38, which is Plaintiff's Exhibit 6, a lateral view, shows identically the same thing as we saw in the one of 5/13/38.

"Q—You don't see any additional fracture lines, do you?

"A—No, sir. The one of the pelvis, 7/27, the only remarkable things I see in that are two irregular or ovoid bodies, apparently bony in character, one lying either within or without the pelvis. I cannot say which. The larger one on the right side, one lying external to the hip joint on the left side.

"And this view (indicating) is practically an identical view.

"Q—Doctor, what effect did those three fractures have, or what effect could they have upon the spinal column? [108]

"A—Well, they make a reverse curve of the spine, by reason of the fact that they are wedged-shaped. The part

(Deposition of Dr. Steele Stewart)

that ought to be concave now becomes convex and would be the cause of the lump which I observed in her back.

“Q—Did you find in the X-rays that the curve of the back was changed?

“A—Well yes.

“Q—That was indicated from your examination of Miss America?

“A—From the examination.

“Q—Does that show on the X-rays, too?

“A—And it would cause a weakness of the spine, so that a person wouldn't have the normal strength in the spine. The inflammation that is incident to the fracture and the healing of the fracture and using a bad position, all of them would cause pain in the back.

“Furthermore, in the course of the examination I forgot to say that her back was tender to pressure.

“Q—Doctor, what do you mean, or could you explain to us a little more in detail what a compressed fracture is?

“A—Well, a piece of the spine, which we call a vertebra, is a good deal like a soft piece of wood; and if you took that piece of wood and lay it on the floor and hit it with a sledge hammer along one edge, why, you would get a wedging of the body of the block of wood and a driving of one cell after another into cells that lie below it. Do I [109] make myself clear? I don't know.

“Q—Doctor, are there any nerve centers in the area where you found the fractures?

“A—There are many nerves that pass down to supply the lower legs.

(Deposition of Dr. Steele Stewart)

“Q—Could you tell us, Doctor, from your examination of her leg, or do you have any opinion, Doctor, from the examination of her leg, what causes the condition you found to exist?

“A—Well, it is a very bizzarre picture, and the fracture of the spine, in and of itself, would probably not cause that picture. It would be a thing which would result from injuries to the spinal cord or the nerves coming off from the spinal cord.

“Q—In the area where the injury occurred, Doctor?

“A—Yes, or it might occur anywhere. I feel that it is essential to the medical testimony that I indicate just how I understood the accident occurred.”

“Q—Doctor, is it necessary that you give the declarations and statements made to you by Miss America Olvera in order for you to form an opinion as to the nature and extent of her injuries?”

Mr. Marcus: I will go a little further down, line 16, page 285.

Mr. Combs: That's right.

“Q—Doctor, did you discuss with Miss America Olvera the [110] nature of her injuries?

“A—Yes, I discussed with her the—

“Q—Just answer yes or no on that, Doctor. And did you discuss the manner in which the accident happened, with her?

“A—Yes.

“Q—Did she relate to you at the time the manner in which the accident happened?”

(Deposition of Dr. Steele Stewart)

Mr. Combs: I guess we will go down to line 10 on page 286?

Mr. Marcus: That's right.

"Q—Did she state to you, Doctor, the manner in which she believed the accident happened?

"A—Yes.

"Q—Doctor, in order for you to form an opinion as to her disability and injuries, is it necessary for you to give, as a basis therefor, the history and the statements given to you by Miss America Olvera?

"A—Yes, sir.

"Q—Will you please relate the conversation, now?"

Mr. Combs: The answer is on line 15: "A—The essential things in her statements to me were that she fell a distance of about 40 feet and landed in a sitting position, or in—landed on her hips with her feet and head up, semi-jackknife position, in reverse position.

"Q—Is that all you need, Doctor, in order for you to [111] form your opinion?

"A—And that she was not knocked unconscious.

"Q—Doctor, do you have an opinion at this time as to—I believe that is where we left off this morning—as to the injuries to the spinal cord?

"A—Yes, I do.

"Q—Will you give that, please?"

Mr. Marcus: Down to line 13:

"Q—Doctor, would it make any difference if she had fallen 20 feet or 40 feet, as a basis for your conclusion?

"A—The conclusion that I reached, based on the history of a fall from a reasonable height, or a considerable

(Deposition of Dr. Steele Stewart)

height, landing in that position, combined with the evidence that we had objectively of disability involving her right leg—and by this disability we mean the inability to use the leg, the disturbance of sensation, a slight disordering of the reflexes—was that she, in all probability, sustained a hemorrhage or hemorrhages into the spinal cord.

“Q—Are you acquainted with nature of physical effort required by a trapeze performer, just generally?

“A—I have seen trapeze workers, or artists, rather, and know something about how they perform. I have not had any personal experience with the bar, and so on.”

Mr. Combs: Page 290?

Mr. Marcus: That's right.

“Q—Can you tell us to what extent her injuries have [112] disabled her physically?

“A—I think it would be a very difficult thing for her to engage in any occupation that required her to be on her feet, either standing or walking, for any length of time, and where any great distance was concerned. I think it will be possible, not knowing at all what her educational background is, that she should be able to do some type of work where she can sit most of the time.

“Q—Doctor, do you have any opinion at this time as to whether or not such injuries as hers are permanent?

“A—Assuming that our diagnosis is correct, and that hemorrhages have occurred into the cord, as is our belief, the result of those would be two: first of all, causing degeneration within the cord, and, second, scar tissue within the cord, so that the individual would have

(Deposition of Dr. Steele Stewart)

practically no chance of a complete restitution or partial restitution at this late date."

"Q—You know that this accident occurred in the year 1937, do you not, Doctor?"

Mr. Marcus: Maybe we should inform the jury that now they were proceeding in the cross examination.

The Court: Yes.

Mr. Combs: Mr. Combs is cross examining the Doctor at this time.

Mr. Marcus: It so happens that Mr. Garrett was doing the cross examining. [113]

Mr. Combs: Yes.

"Q—You know that this accident occurred in the year 1937, do you not, Doctor?"

"A—I was told that.

"Q—Are you engaged in treating the plaintiff, or were you retained merely to make this one examination?"

"A—I was asked to make the examination, was all.

"Q—Did you find, in the course of your examination, any definite organic pattern or picture which would account for the symptoms indicated?"

"A—It was, as I stated in my direct testimony, a very bizarre picture, and you could not hypothecate a single, tiny injury to the cord that would produce the entire picture that she had. The usual situation is that with an injury of this type, a fall or landing in that position, you get multiple little hemorrhages, so it is my feeling that we do have evidence of an organic basis that we cannot sidestep entirely.

(Deposition of Dr. Steele Stewart)

"Q—And that evidence of an organic basis is based, to some extent, I suppose, upon subjective symptoms?

"A—Yes. In examination for anesthesia, I cannot tell you whether you feel a thing or not; I have to depend on you telling me whether you feel it or not. However, she was consistent. As we checked back and came to the same spot, the same change would occur at that point, which would lead us to believe it was a true anesthesia. [114]

"Q—Before I forget it, as a layman I would like to ask you what the word 'bizarre' means in the sense you use it in speaking of the situation as being rather bizarre.

"A—Well, it is a picture of symptoms that is not definable as being caused by a single, definite lesion or injury.

"Q—You had never seen Mrs. Pollinger, of course, before she came to you for examination this month; is that correct?

"A—That is correct.

"Q—Your opinion regarding her disability for further employment, or partial disability, let us say, one or the other, is based, to some extent, upon the subjective symptoms, is it not?

"A—Yes, sir.

"Q—That is, the complaint she makes, that would keep her from standing?

"A—Yes, in part, and in part, too, the pain that is in her back, which is a very frequent, almost universal, result of severe back injury such as she has.

"Q—In addition to being a common result, your information that she has it is also drawn from her sub-

(Deposition of Dr. Steele Stewart)

jective complaints? That is, she tells you she has it, is that correct?

“A—Yes.

“Q—Doctor, considering the accident happened in 1937, [115] would it change your conclusions any—and I will ask for a ‘Yes’ or ‘No’ answer to this—if you learned at this time that in October, 1938, a little more than a year ago, she had, upon examination, complained of pain upon extreme motions of the right hip and some tenderness to pressure about the right hip region; that she complained of pain in this region upon extreme rotation of the thigh, and upon weight bearing; that there was at that time no deformity or external evidence of injury; that at that time, on the neuro-muscular side, all of her reflexes were present, normal and equal on both sides; that there were no tremors, no atrophies, hyper-atrophies, paralyses, anesthetics or paresthesias, no thesias, no central nervous lesions—if it were established that such was the situation at that time, would that have a tendency to change your opinion in any particular from the opinion you have given here?”

“A—Well, I would want to know, in addition to that, something about the examiner and his relative care in making examinations. The X-rays which I saw, I believe, antedated that, and they show deformity, so on that ground, if your hypothetical question is correct, I would think that there had not been an adequate examination by the examiner.

“Q—Perhaps you are right, and perhaps you do not understand my question. It is rather an involved one, and I am a layman, so far as your profession is con-

(Deposition of Dr. Steele Stewart)

cerned, so I [116] will ask you one question to make sure that we understand each other. When you speak of the bony pathology—is that what you call it?

“A—That is right.

“Q—Were you speaking at the time of the evidence of injury to the segments of the spine?

“A—Yes.

“Q—Yes, that is right. Did you understand me to read anything to you concerning the spine or pathology of the spine? I ask that, because I think if you did you misunderstood me and I can clear it up by going back over this question.

“A—What you read, as I understood, was that you said there was no deformity. You didn’t state where the deformity was or where there was no deformity.

“Q—Considering that the examination has been confined to the lower extremities and bearing in mind the date of the occurrence of this accident, would it change your opinion, or any of the opinions you have expressed here, if you knew that as a fact, if it is a fact, on October 13, 1938, with respect to her lower extremities, on examination she complained of pain upon extreme motion of the right hip and some tenderness to pressure about her right hip joint region. She complained of pain in this region upon extreme rotation of the thigh and on weight bearing; there was no deformity or extreme evidence of injury. Neuro-muscular: all of her reflexes were present and normal and equal on both [117] sides. There were no tremors, atrophies or hypertrophies, paralysis, anesthasias or paresthasias. No evidence of any central nervous lesion?

(Deposition of Dr. Steele Stewart)

“A—I would feel that the question, or the evidence that is permitted would be only partial, in this respect: That no evidence of any central nervous lesion—that would not necessarily exclude the fact that pain and tenderness around the hip joint came from some lesion of the nervous system; and I think it is a conclusion that is not completely warranted by the facts recited as he gave them, or as you gave them, rather. And as far as the other symptoms are concerned, I still would say that I would like to know something about the general care of the examiner, in that regard.

“Q—Do you have any history, Doctor, of any previous falls that the patient had had?

“A—The patient stated that several years before—I don’t know the date offhand—she had had a fall in which she had broken her wrists or dislocated her wrists; something of that sort. She still shows some of the effects of that. I don’t just remember how it occurred, except that she told me she fell on her face and guarded her face with her hands, but I don’t recall anything else.

“Q—Were you given any history of any injury occurring, Doctor, after this accident sued on here, which occurred in 1937? [118]

“A—I don’t recall any other history of any other, although it seems to me that she said something about there had been an automobile accident, something of that sort, but it was evidently a very minor affair, from the way they spoke of it.

“Q—Now, Doctor, if it were established as a fact that the plaintiff had no—without respect to the care of the

(Deposition of Dr. Steele Stewart)

examiner, now. I am just going to ask you to assume that this has been established—

“A—Yes.

“Q—I think that gets around your objection, because this is just a hypothetical question. If it were established as a fact that in October, 1938 plaintiff had showed that all of her reflexes were present, normal and equal on both sides, without any tremors or atrophies or hypertrophies, paralysis, anesthetics or paresthesias, would that fact, if established, tend to modify any of the opinions you have expressed here? If you like, you may just answer that yes or no, and then state in what respect it would tend to modify them.

“A—Yes, I think it would. I think it would tend to make me believe that there was more of the functional side, rather than of the organic side.

“Q—Is there a possibility that some of the symptoms that you observed could be hysterical, Doctor?

“A—Yes, that always is possible. [119]

“The Court: There is no testimony, that the court recalls, regarding an examiner. He stated that he is a physician and surgeon and specialized in orthopedics. Isn't that correct, Doctor?

“A—That is correct.

“Q—That establishes the fact, and I will withdraw the question, if I may, your Honor. You are experienced, are you not, Doctor, in the treatment of such injuries as the plaintiff here exhibits?

“A—Yes, sir.

(Deposition of Dr. Steele Stewart)

“Q—What treatment is indicated for her condition and what results would you expect from such treatment? That is a compound question, and I will split it up if you like.

“A—If you refer to the treatment from this moment on, or whether you mean the treatment of the case from its inception or—

“Q—No. I would like you to describe it in general, Doctor, if you will. Will you confine your views just to the treatment that may be indicated in the future and the probable results?

“A—In the first place, we have a spine which is injured and which is in poor position, and the use of her back throws a strain on that spine at every attempted use of the back. And under those circumstances it has been found in a considerable number of cases that the most relief is a joining together of the injured vertebra and a [120] tying to the injured vertebra of at least one normal vertebra on either side, so that that portion of the spine instead of moving, as a series of segments might move on one another, would then move as a block and take care of the many little strains that go in; and that very frequently gives a great deal of relief from the pain that the patient experiences, and also allows him much better use of the part than they would have in the condition that she is in at the present time.

“Q—And such a result, if it were achieved, would also have the effect, would it not, of relieving the leg symptoms, if they are partly hysterical in nature?

(Deposition of Dr. Steele Stewart)

“A—I never have seen that happen, although I have heard of it happening, as I have talked with other men about similar cases.

“Q—Those areas of the spine involved, those segments are down near what is known as the small of the back, are they not, Doctor?

“A—They constitute three-fifths of the small of the back.

“Q—Three-fifths of the small of the back?

“A—Yes, sir.

“Q—And these lumbar vertebrae are joined by another type of vertebra at the upper end, are they not?

“A—Yes, the type begins to change at that point.

“Q—And what are they called? [121]

“A—Thoracic or dorsal vertebrae.

“Q—And there are also vertebrae below those three lumbar vertebrae?

“A—There are two more lumbar vertebrae.

“Q—Then there are other vertebrae, in the sacrum?

“A—In the sacrum or the tail-bone.

“Q—Those sacro vertebrae do not require any movement at all, do they, Doctor?

“A—The sacrum is made up of a series of vertebrae, which are fused or joined together in fetal life—

“The Court: Has there been any testimony as to injury to those parts of the spine? If there hasn't, I don't think you should take up the time, Mr. Garrett.

(Deposition of Dr. Steele Stewart)

“Mr. Garrett: I beg your pardon, your Honor.

“The Court: Did you testify to any injury of it, Doctor?

“A—No.

“Q—With respect to the fusion of these lower vertebrae, does that continue into the lumbar vertebrae, to any great extent, in later life—normal later life?

“A—you mean the fusion that normally appears in the sacrum?

“Q—Yes.

“A—It may in part, and it may involve one completely at times, but that is rather rare.

“Q—Does normal activity require any movement of the [122] vertebrae affected in this patient?

“A—Yes, sir.

“Q—To what extent?

“A—It is essential, in that it makes possible the individual retaining their equilibrium. If you were a lover of dogs and watched a pup running along, you could see how his hind quarters wove back and forth with the various steps. Not being a doctor I don't suppose you have seen so many in the nude, so I didn't refer to a human, but that does happen in the human, that same sore of thing. It is part of the adjustment that we have that helps maintain equilibrium.

“Q—Would any particular limitation or disability for the tasks of everyday life result from the fusion of the

(Deposition of Dr. Steele Stewart)

first and second lumbar vertebrae, in the manner you have spoken of?

“A—The two points in the spine where most motion occurs, that is, that motion of the body, are the place where the lumbar vertebra joins the sacrum and at a point where the lumbar vertebrae join the thoracic vertebrae. You would have to catch the thoracic in a fusion and you would have to catch the lumbar, and that would eliminate one point of motion in the back; and any motion that required activity at that particular part would be hampered.”

Mr. Marcus: The next is redirect examination.

“Q—Doctor, when you say it might alleviate the patient [123] in the event some of these vertebrae were fused together, how would that be accomplished?

“A—By surgical procedure, you would have to go in and expose the whole back of the spine in that area. You would have to scrape out the cartilage between the various joints, in that case there would be ten small joints that would have to have cartilage removed from them, and you would have to introduce bone grafts, either taken from the spine itself, lapping one over the other, or take bone grafts from the shin, in order to get a solid piece of bone.

“Mr. Marcus: Thank you Doctor. That is all.” [124]

Los Angeles, California, January 5, 1944; 10.00 o'clock
A. M.

KARL POLLINGER,

a witness called by and on behalf of the plaintiff, having
been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Marcus: State your name, please.

A. Karl Pollinger.

Q. Mr. Pollinger, what is your business or occupation?
A. I am a circus performer.

Q. Do you have an act? A. Yes, sir.

Q. In the circus? A. Yes, I have.

Q. Were you employed by the Ringling Circus?

A. Yes, I was.

Q. And did you perform in the Ringling Bros. Circus?
A. Yes, I did.

Q. And did you, in 1937, go to San Diego with your wife?
A. Yes, I did.

Mr. Combs: Now, if the court please, all questions so far have been leading and suggestive. They have been preliminary, but I am fearful they will continue.

The Court: Proceed, Mr. Marcus.

Q. By Mr. Marcus: Are you acquainted with your wife's trapeze? [125] A. Yes, I am.

Q. Is it the trapeze that has been introduced in evidence here? A. Yes, the very same one.

Q. Did you ever witness your wife perform?

A. Yes, many times.

(Testimony of Karl Pollinger)

Q. Beginning with the performance in San Diego, and the itinerary from San Diego, will you describe to us what your wife did in the nature of her act?

A. She had a balancing act, which means standing on the trapeze, and not using her hands, and balancing her body on the bar.

Q. You heard her testimony, did you?

A. Yes, sir.

Q. That was substantially her act?

A. Yes, sir.

Mr. Combs: I object to that as a conclusion.

Mr. Marcus: I will withdraw it.

Q. Will you tell us whether or not you assisted your wife at all during her performance? A. No, sir.

Q. Did you do anything in connection with her act?

A. No, sir, I did not.

Q. Did you at any time during her itinerary come out with her? A. Yes, sir, I did. [126]

Q. Over what period of time?

A. About two months before the accident happened.

Q. About two months prior to the date of the accident?

A. Yes. I came out with her every day.

Q. And you continued for those two months until the date of the accident, did you?

A. Yes, sir.

Q. When did you appear with her? When did you come out with her?

A. I always came right behind her.

(Testimony of Karl Pollinger)

Q. Did you at any time come out before she came out?

A. No, sir.

Q. Tell us what you did when you came out with her?

A. When I came out with her I watched her until she took a bow. Then I went in front of the ring and helped one of the property men to pull her up to the trapeze. Immediately after that I went to the outside of the ring and held the rope until she was through with the first part of her act. Before the second part of the act there was an announcement. She was introduced by the announcer to the public as the only woman who performed this very act. At that moment I took the rope, and went to the center of the ring. She holds the rope with one hand and I start her swing about two times, then I took the very same rope and went to the outside of the ring, and hold it until she finished. When she finished some property men and I went to the ring and let her come down. [127]

The Court: Did you say you helped raise her?

A. Yes, I helped pull her up.

Q. When she first came out you helped pull her up?

A. Yes, your Honor.

Q. By Mr. Marcus: You say this procedure began about six weeks or two months before the accident?

A. Yes.

Q. Tell us how it was you began to do that.

A. Because many times the boys had tried to pull her up in the air, and a lot couldn't do it, and I went in myself to help to do so.

(Testimony of Karl Pollinger)

Q. It would be your responsibility to do that?

A. Yes, during the last six or seven weeks.

The Court: Mr. Marcus, because of the court's knowledge from the preceding trial, I think it might be explained that Mr. Pollinger had a strong man act, because he speaks about coming in and pulling her up.

Q. By Mr. Marcus: Will you explain what your duties were, and what your act was in the circus. Mr. Pollinger, what did your act involve, very briefly, please?

A. I had a big tower, like the French Eiffel Tower, and on top an airplane and three motors, and two persons were on it, and I picked it up with my shoulders and balanced.

Q. What did it weigh?

A. A little more than a thousand pounds.

Q. A little more than half a ton? [128]

A. Yes.

Q. You lifted that yourself? A. Yes.

Q. I presume there was no effort on your part to lift your wife? A. No, sir.

Mr. Combs: That is objected to. There was some effort, of course.

Q. By Mr. Marcus: Outside of helping your wife up on the rope, and give her rope a swing, as you testified, did you do anything else?

A. No, sir, I did not.

Q. Mr. Pollinger, during this itinerary did you observe anything in the ring at the time your wife performed?

A. It was the men standing there with the net.

(Testimony of Karl Pollinger)

Q. How many men were holding the net?

A. About eight.

Q. Mr. Pollinger, how long had you been engaged in circus work prior to the date of the accident?

A. About ten or fifteen years.

Q. Are you acquainted with the nature of nets, and their uses? A. Yes.

Q. Have you, during those years, witnessed different kinds of nets used in the circus?

A. Yes, sir, I witnessed all kinds of nets. [129]

Mr. Combs: I would like to object to the introduction of any evidence concerning a net, for the reasons stated in my objection to Miss Olvera's testimony.

The Court: Objection overruled.

Mr. Combs: May I ask that that objection may be deemed to go to this entire line in regard to the net?

Mr. Marcus: It is all right with me.

The Court: That will be satisfactory to the court. Proceed.

Q. By Mr. Marcus: Mr. Pollinger, what kind of net was being used by the Al G. Barnes Circus at the time? A. It was a movable net.

Q. How large is this net?

A. I would say, roughly, 8 x 10, or 10 x 10.

Q. Can you describe the net construction, please?

A. Yes, the net was of canvas, about 10 x 10 feet. Outside of this canvas is heavy rope, and this rope has some loops attached to it, and each man holds two loops in his hand, and watches the performer.

(Testimony of Karl Pollinger)

Q. You call that a movable net? A. Yes.

Q. Is any other kind of net used by the circus?

A. Yes, they use stationary nets.

Q. Describe the stationary net used by the circus.

A. There are all kinds of stationary nets.

The Court: It doesn't seem that we should go into a [130] description of other nets.

Q. By Mr. Marcus: Did you take any part in holding the nets at all? A. No, sir.

Q. Had you on any occasion taken any part in holding the net? A. No, sir.

Q. Who were these men who did?

A. The net men from the show.

Q. Did you pay them? A. No, I did not.

Q. Do you know who paid them for their services?

A. Yes.

Q. Who did? A. The show paid them.

Q. What did these men do besides hold the net, to your knowledge?

A. I wouldn't know just what kind of work they did.

Q. Did you ever see them render any services besides holding the net? A. No, sir.

Q. Do you remember the date of this accident?

A. I do.

Q. What date was it? A. November 12th.

The Court: What date? [131]

A. September 12th.

(Testimony of Karl Pollinger)

Q. By Mr. Marcus: September 12th of what year?

A. 1937.

Q. Where did it happen?

A. At Anthony, Kansas.

Q. Explain to the jury exactly what happened, from the moment that your wife came on.

A. On September 12, about around 4:00 o'clock in the afternoon my wife went into the ring. I was about three or four feet behind her. As soon as she stepped into the ring I went to the front and helped pull her up to the trapeze. Then she started to work. She worked the first part of her act. I stayed outside the ring, holding the rope, so she wasn't disturbed.

Q. How long did that take, the first part of her act?

A. Maybe two or three minutes. When she completed the first part of her act I came in with the rope and started her to swing. I gave her two swings, and then went over to the outside with the rope, and stood watching her. Then she tried standing up on the trapeze, putting the left foot forward, and then the right. She put out her left foot when about the center of the bar. When she came to the center of the bar she put up her right foot, and stood up. She completed standing up, and in that moment something snapped, and the trapeze threw her out in front.

Q. Did you hear a noise at that time? [132]

A. Yes, sir, I did.

Q. What kind of a noise was it?

A. A sharp metallic noise, like something broke.

Q. You remember the sound of that noise?

(Testimony of Karl Pollinger)

A. I always will remember.

Q. At that time, when the accident happened, had the band stopped playing?

A. After her first part of the act, there came the announcement. There was no noise at all.

Mr. Combs: I object to leading and suggestive questions.

The Court: Yes, counsel should avoid leading.

A. There was no band playing. It was very quiet in the show, because they expected to see something extraordinary.

Q. By Mr. Marcus: Would you recognize the sound that you heard at that time?

A. Yes, I certainly would.

Mr. Combs: At this point, we object to the attempt of counsel to indicate the noise by rattling the bar, upon the ground that it is too remote, and has no connection with the circumstances surrounding the particular moment.

The Court: The objection is good.

Mr. Marcus: I will attempt to lay a further foundation.

Q. Tell us whether at that time there were any noises, to your knowledge, in the tent.

A. Definitely no noises at all.

Q. What was the condition there at that time with [133] respect to sound or noise?

Mr. Combs: That is objected to as calling for the conclusion of the witness.

Mr. Marcus: The witness can testify whether there was any noise.

(Testimony of Karl Pollinger)

The Court: Yes, he can testify as to whether it was quiet.

A. She started to do her last trick, and after the announcer finished announcing her at that moment everybody expected something, and glued their eyes to the center of the ring where the performer was working.

Q. By Mr. Marcus: Were any other acts being performed at that moment?

A. No, sir, she was the only one in the show.

Q. After this announcement that was made did the band start playing? A. Yes, sir.

Mr. Combs: I again ask that leading and suggestive questions be refrained from.

The Court: I don't think that is directing his attention to a particular thing.

Mr. Combs: I don't care about that, particularly.

The Court: Proceed.

Q. By Mr. Marcus: Now, can you tell us whether or not you heard any noise?

The Court: He has already said he heard a metallic [134] noise; something striking metal.

Q. By Mr. Marcus: Do you know where that noise came from? A. Definitely, yes.

Q. Where did it come from?

A. Right from the trapeze.

Q. Do you know what part of the trapeze it came from? A. Yes.

Mr. Combs: May I ask a question on voir dire?

The Court: Yes.

(Testimony of Karl Pollinger)

Q. By Mr. Combs: Mr. Pollinger, did you observe the trapeze at the time the noise occurred?

A. At the time the noise occurred I had the rope in my hand, and the noise, and all the vibration from the guy lines came at the same moment together.

Q. Whereabouts were you looking at that particular moment? A. At my wife.

Q. On the trapeze bar? A. Yes.

Q. You were not looking at the crane bar?

A. No, I had the guy line in my hand.

Q. At the time the noise occurred you did not see the crane bar? A. No, I did not.

Q. By Mr. Marcus: Where did the noise come from?

Mr. Combs: I object to that as calling for the con- [135] clusion of the witness.

Mr. Marcus: I submit he would not have to look at a place to know where the noise came from.

The Court: Objection sustained.

Q. By Mr. Marcus: Could you tell from what part of the tent the noise came?

Mr. Combs: Same objection.

The Court: Overruled. You may answer.

A. The noise came right from the main trapeze, and all four guy lines were shaking, like it went out of place.

Mr. Combs: May I ask that the answer be stricken?

The Court: It may go out as a voluntary answer.

(Testimony of Karl Pollinger)

Q. By Mr. Marcus: Did you observe the lower bar as you came in with your wife? A. Yes, I did.

Q. What was the condition of it at that time?

A. In perfect level condition.

Q. Tell us whether at that time you could see any other part of the trapeze?

A. I just looked at the trapeze bar.

Q. After your wife fell did you see the lower bar?

A. Yes, I did.

Q. When was that?

A. When my wife fell—may I explain, your Honor?

The Court: Just answer the question; when.

A. Shortly after I carried my wife out. [136]

Q. By Mr. Marcus: How long was that after the accident?

A. About a second. When my wife fell down I pretty near caught her before she fell to the ground. I rushed out immediately.

Q. What did you do when you saw her fall?

A. I picked her up immediately and ran out with her.

Q. Did you see the men with the net standing there?

A. They still stood there when I went outside of the ring.

Q. Did you see them standing there?

A. Yes.

(Testimony of Karl Pollinger)

Q. Did the men holding the net move at any time before your wife fell from the trapeze, until she struck the ground?

A. No, sir, most of them did not even observe she fell down.

Q. Answer the question: Did they move at any time from the moment your wife fell from the trapeze until she struck the ground?

A. No, they didn't.

Q. Did you move?

A. Yes, I did.

Q. What did you do?

A. I ran to catch my wife.

Q. How far were you, at the moment she struck the ground?

A. When I see her fall down I was about ten or fifteen feet, and the moment she struck the ground I was about two [137] feet away from her.

Q. Did she do anything, or did anything happen on the way down?

A. Yes, she fell face forward. She tried to hold herself, but she couldn't because the trapeze bar went back so fast, so she turned a somersault to save her face.

Q. How did she do that?

A. It means reaching for both legs with both hands.

Q. Demonstrate to the jury.

A. Like this, pulling her body close together.

Q. Did you see your wife strike the ground?

A. Yes, I did.

Q. Did she strike anything on the way down?

A. One of the property boys.

(Testimony of Karl Pollinger)

Q. Did your wife make any statement at the moment the accident happened?

A. The moment she fell down she was screaming "Look at the trapeze," but I didn't look at no trapeze. I took her in my arm and carried her out.

Q. Where did you carry her to?

A. I carried her outside of the ring where the tubs from the elephants are, two or three of them, and she told me, "Let me down. Drop me down." So I put her on one of those tubs and supported her back with my hand. At that moment she pointed to the trapeze and said, "Look at the trapeze." The trapeze was swinging. [138]

Q. Did you look at that time?

A. Yes, I did.

Q. What did you observe about the trapeze at that time?

A. Well, one side was about five or six inches down lower than the other side.

The Court: Read the answer.

(Answer read by the reporter.)

Q. By Mr. Marcus: Then what did you do?

A. Then I carried her out and some man helped me carry her out.

Q. Who helped you?

A. The Indian Chief. We formed a kind of bridge with our hands. I held with the right hand, and the left hand I supported her back, because I could feel a lump.

(Testimony of Karl Pollinger)

Q. Did you see any other injury to her body at that time? A. Yes.

Q. What did you see?

A. One elbow was out of place; the bone stuck out.

Q. Stuck out where? A. Out of the elbow.

Q. Sticking through the skin? A. Yes.

Q. Was she bleeding in any part of the body?

A. Very little, from the arm.

Q. Any other part of the body? A. No. [139]

Q. Did your wife lose consciousness at any time that you observed? A. No.

Q. Then where did you take her?

A. Outside of the doctor's tent. We had a doctor in the show. At the same moment we came out there was a doctor from town, and she told him, "Please put my arm in place." The doctor from town tried to put the arm in place. She told him how to do it; she said "Put your foot under my shoulder and let it go back." He tried several times, but couldn't do it. My wife asked me to please help. I couldn't do it.

Q. How long did she remain in the hospital at Anthony, Kansas? A. About a week.

Q. Did you remain with her? A. Yes, I did.

Q. Mr. Pollinger, did your wife perform in your act?

A. Yes, she did.

Q. What did she do in connection with your act?

A. She worked in the part where the airplane was; made some aerial exercises.

(Testimony of Karl Pollinger)

Q. In connection with doing her act, can you tell when you did your act?

A. My act was immediately after hers.

Q. I presume you did not perform that day? [140]

A. I did not.

Q. How long afterward was it that you did not perform? A. I was out quite some weeks.

Q. Your wife remained in the hospital approximately a week, you stated? A. Yes, sir.

Q. Then what happened?

A. When we were in the hospital the doctor from the hospital gave her some medicine to stop the pain; she took it constantly, and it made her more comfortable. She said, "I want to go with you," so I took her to Amarillo, Texas, where the show was located at that time. I rented a place, and we lived there about two or three weeks while the show was in town.

Q. During that time you did not perform either, did you? A. No, sir.

Q. Has your wife to your knowledge at any time since the date of the accident performed in any circus?

A. No, sir, she did not.

Q. Has she worked at all to your knowledge?

A. No, but she attempted one time to practice in the winter quarters.

Q. Where were the winter quarters?

A. The winter quarters are in Baldwin Park. It was, I imagine, around February, after her accident.

(Testimony of Karl Pollinger)

Q. She tried to perform her act? [141]

A. She tried to go up on the trapeze. We tied her with all kinds of rope, and pulled her up.

Q. She tried to do her act? A. Yes.

Q. What happened?

A. She couldn't even stand on her feet. As soon as we released the rope she hollered "Let me down."

Q. Do you know if she ever made an effort to go on the trapeze again? A. No, sir, she did not.

Q. When you left Amarillo, Texas, how did you travel with your wife?

A. Travelled in our place. In the show we had a compartment in the Pullman car, a place where she slept, and under doctor's orders I had fixed some boards in order that she did not move while the train was in motion. That was where she remained several weeks.

Q. Travelling in the train? A. Yes.

Q. You reached Baldwin Park?

A. Yes, we did.

Q. How long did you remain there? ,

A. In Baldwin Park?

Q. Yes. A. About April, 1938.

Q. Was your wife able, after the accident, while you [142] were living in Baldwin Park, to perform her household duties? A. No, sir.

Mr. Combs: I ask that the answer go out, and object to it as calling for the conclusion of the witness.

The Court: That may go out.

(Testimony of Karl Pollinger)

Q. By Mr. Marcus: Did she do any household work?

A. She was—

The Court: No, just answer the question.

A. No, sir, she did not.

Q. By Mr. Marcus: Did you do the household work?

A. Yes, I did.

Q. Have you gone back to the circus?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

Mr. Marcus: I will reframe it: Have you done any work for the circus since the time of your wife's accident?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. By Mr. Marcus: When did your wife first begin to walk, after the accident?

A. I can't state clearly what time, but she always tried—

The Court: That is not the question.

Q. By Mr. Marcus: Do you remember when it was she first tried to walk? [143]

A. While we were in Baldwin Park.

Q. Has she at any time since the date of the accident been able to walk without crutches, to your knowledge?

Mr. Combs: I object to that as calling for the conclusion of the witness.

The Court: Sustained.

(Testimony of Karl Pollinger)

Q. By Mr. Marcus: Did she at any time to your knowledge, since the date of the accident, walk without crutches? A. No.

Q. That has been during the past seven years, has it not? A. Yes.

Mr. Marcus: You may cross examine.

The Court: The court will now take a recess. During this recess the jury will bear in mind the admonitions of the court.

(Short recess.)

(Stipulated that the jurors are all present and in their places.)

Cross Examination

Q. By Mr. Combs: Mr. Pollinger, you were present about a year ago when I was up there at your home in connection with the matter involving Ruby Olvera?

A. Yes.

Q. Isn't it true that at that time your wife was walking without crutches, walked across the entire lot without [144] crutches, without taking the hand of that little girl? A. No, sir, it isn't true.

Q. Isn't it true that your wife walked without crutches at the trial of that guardianship matter, down at Long Beach?

Mr. Marcus: That is an absolute misstatement of the fact.

Mr. Combs: (To plaintiff) What did you say, Miss Olvera? You swore at me, didn't you?

(Testimony of Karl Pollinger)

The Court: I don't care for any such conversation here. I did not hear it, and it is not part of the record. Proceed. You have a right to ask him if she walked.

Mr. Combs: Will the witness answer the question?

A. No, she did not walk without crutches.

Q. Mr. Pollinger, you are a very fast runner, are you not? A. Not a particularly fast runner.

Q. Just about an ordinary runner?

A. Yes, sir.

Q. You are familiar with the rule of physics that a falling body falls sixteen feet the first second, and thirty-two feet the second?

Mr. Marcus: I object to that as assuming facts not in evidence, and calling for a conclusion.

The Court: He just asked him if he was.

Q. By Mr. Combs: Are you familiar with that rule of [145] physics?

A. Yes, I am fairly familiar with that rule of physics.

Q. How high was the trapeze bar from which America fell?

A. Let us say from 20 to 25 feet.

Q. Can you put it exact, at 20 feet?

A. I do not have a ruler to measure it. I would be very careful to make the statement.

Q. Your wife testified 22 feet. Is that approximately right? A. Yes, approximately.

Q. How long would you say it took your wife to fall from the trapeze bar to the ground?

(Testimony of Karl Pollinger)

The Court: I don't think you need answer that question. It is a rule of physics.

Mr. Combs: I will figure it out, your Honor. I think it is a fact of which the jury takes judicial notice; the court and jury.

Q. You ran the distance from a point 10 or 15 feet away to a point within two feet of your wife?

A. Yes.

Q. While she was falling? A. Yes, I did.

Q. You started running the instant you saw her start falling? A. Yes.

Q. What did you do, drop the rope, and start running? [146]

A. Honest to God, I don't know what I did.

The Court: Don't use an expression of that kind in court.

A. I don't know what I did with the rope.

Q. By Mr. Combs: You don't know a thing other than you covered the distance from a point 10 or 15 feet away to a point 22 feet, while your wife was in the air?

A. Yes.

Q. And you started after she fell?

A. Yes, that is correct.

Q. Do you know how far you can run a second?

A. Yes.

Q. How far can you run a second?

A. It all depends. You can jump 10 feet in one second, but you couldn't run 10 feet maybe in one second.

(Testimony of Karl Pollinger)

Q. You mean you can jump faster than you can run, is that it?

The Court: Don't argue with the witness.

Mr. Combs: I am just trying to bring my case out in a fair and proper manner.

The Court: You have a right to bring your case out, but bear in mind the admonition of the court.

Q. By Mr. Combs: You are able to testify that you can jump 10 feet in one second?

A. Yes, I am.

Q. From a level straight away?

A. I don't know which distance—[147]

Q. Are you talking about jumping down, up, or jumping on the level?

A. May I explain something?

Q. I would like to have that explained.

A. Yes. I stood outside of the ring, and had one foot resting on the ring itself the moment I saw my wife falling. You couldn't apply the law of physics to a living body. It would be incorrect.

Q. Why?

A. Because a living body changes in every point constantly. My wife in that case made a complete somersault to avoid falling on her face, which takes considerable time to do so. From the moment she was out of balance she stood maybe a second and a half on the trapeze before she fell from the trapeze.

Q. She lost her balance? A. Yes.

Q. You saw that occur? A. Yes.

(Testimony of Karl Pollinger)

Q. Then you saw her stand there a second and a half?

A. I don't know how long; she was trying to keep herself up in the air. That was just natural.

Q. Did she hang onto the side of the trapeze?

A. She tried to touch it with her hand.

Q. But she was unsuccessful? A. Yes. [148]

Q. I thought you said she doubled up?

A. That is what she did when she left the trapeze.

Q. She first tried to hold on? A. Yes.

Q. Then she doubled up? A. Yes.

Q. You say it took her longer to fall from the moment she started falling than the rule of physics requires?

A. Yes.

Q. How much longer?

A. Probably double the time.

Q. In other words, instead of falling 16 feet the first second, she fell only 8 feet the first second?

A. I wouldn't be able to put it in that form.

Q. I presume the second second she fell, however, she did fall at the regular accurate rule of physics?

The Court: Don't answer that. The court will limit the cross examination on that point.

Q. By Mr. Combs: During that period of time you ran or jumped—did you say jumped? A. Yes.

Q. You jump faster than you run?

A. Yes, I do.

Q. You jumped from a standing start?

A. Yes, I did.

(Testimony of Karl Pollinger)

Q. You started to jump at just what instant? [149]

A. At the very moment I saw her and something was wrong.

Q. When did you first start to jump?

A. At the very same moment when I saw her being in danger.

Q. You saw her doing what?

A. Doing her last trick, standing up on the trapeze.

Q. I am getting at the time when you began your standing broad jump. That occurred, you say, at the instant when she started to fall out of the trapeze?

A. When I heard the noise.

Q. When you heard the noise? A. Yes.

Q. That is when you jumped?

A. That is when I jumped; when I saw in the same moment—I heard and saw the same moment, because I was looking at her.

Q. Do you know what the diameter of the center ring in that circus is?

A. I would say about 30 or 35 feet.

Q. It is 36 feet, isn't it?

A. I wouldn't know that. I never measured it.

Q. America's act was in the immediate center of the ring; that is, the trapeze was hung in the immediate center, wasn't it?

A. Even that I couldn't swear to.

The Court: It was in the approximate center, wasn't it?

A. It was in the approximate center, your Honor. [150]

(Testimony of Karl Pollinger)

Q. By Mr. Combs: She fell. Let us find out now how far from the point of the center of the ring was the point where her body hit when she fell?

A. I don't know how many feet.

Q. Have you any idea?

A. I just know I made the jump. I figure it was about from the ring 6 or 7 feet.

Q. Six or seven feet from the ring? A. Yes.

Q. The net was in the center ring, in the exact center, with the center of the net under the trapeze, wasn't it?

A. I couldn't say if it were a little bit more in front of the ring, or a little bit more to the back. I believe a little bit more in front.

Q. The front was the side you were on?

A. Yes.

Q. How much to the front do you believe it was, in feet? A. I couldn't say.

Q. One foot?

A. It could be a foot; it could be four feet.

Q. In relation to the net she fell out of the point that was immediately below the front part of the trapeze, didn't she?

A. She fell right on the side of a man who was back of me.

Q. This man—it was one man. I take it? [151]

A. One man.

Q. She struck him in the back?

A. Yes, about on the hip.

(Testimony of Karl Pollinger)

Q. That man was holding the end of the net, is that right?
A. Yes, sir.

Q. So she fell approximately on the line where the trapeze swung in relation to the net, didn't she?

A. Yes.

Q. Where did you stand in relation to the ring?

A. I was on the left outside guy line.

Q. How long is that outside guy line?

A. They are different.

Q. Are you referring to the guy line that was on the trapeze itself?
A. Yes.

Q. That guy line is not here in evidence, is it?

A. It is here.

Q. Are you sure it is?

A. Sure; we brought it in.

Q. How long was the guy line?

A. May I explain something?

Q. Please answer the question.

The Court: He asked you how long it was.

A. I don't know, your Honor, how long the guy line was. Maybe 30 feet; it could be even 40 feet. [152]

Q. By Mr. Combs: How long was the line you held and swung, on that day?

A. The line went outside.

The Court: He just asked how long it was.

A. 30 or 40 feet.

Q. By Mr. Combs: You held that taut or tight during the entire performance, didn't you?

A. Yes, I did.

(Testimony of Karl Pollinger)

Q. And that line swung from the crane bar?

A. Yes.

Q. Which side of the crane bar?

A. From my side, where I was standing; the left side.

Q. Would you state again how long that line that you were holding was.

The Court: He said 30 or 40 feet.

Mr. Combs: I want to get the hypotenuse of that right triangle.

Q. How high was the crane bar from the ground?

A. The crane bar was from the ground the same length as the hooks, the ropes. The ropes were identical with the height.

The Court: No, he asked you in feet about how high the crane bar was. You don't have to be accurate; unless you know definitely, say approximately.

A. About 35 feet.

Q. By Mr. Combs: Do you know how far from the top of the [153] tent the crane bar was?

A. Right to it.

Q. Right up to the top of the tent?

A. Yes, sir.

Q. Are you able to state with any degree of definiteness the approximate spot, from the point where the trapeze hung down, if it were hanging perpendicularly and motionless, that your wife struck the ground?

(Testimony of Karl Pollinger)

Q. By the Court: You say the crane bar was right up at the top of the tent?

A. Yes, your Honor.

Q. About how far from the top?

A. I would say to the extreme top maybe three feet; something like that.

The Court: Read the question which was unanswered, Mr. Dewing.

(Question read by the reporter.)

Q. By Mr. Combs: Can you state that? You understand the question?

A. Yes, I do.

Q. All right. A. Maybe seven feet.

The Court: Read the question, Mr. Dewing, and the answer.

(Record read by the reporter.)

The Court: Seven feet from what?

Mr. Combs: My question was from a prolongation from the [154] point where the trapeze hung motionless, on the ground.

The Court: It was seven feet from such a point, is that what you meant?

A. Yes, your Honor.

Q. By Mr. Combs: You actually held this rope that she used to ascend with, and you used to accelerate that swing yourself with, taut during the entire performance?

A. I held it on the outside.

Q. During the entire performance?

A. Yes.

Q. And watched your wife during the entire performance?

A. Yes, I did.

(Testimony of Karl Pollinger)

Q. Do you know when the apparatus was erected or put up in the tent? A. No.

Q. You never knew that? A. No.

Q. Did you ever inspect the apparatus before your wife performed? A. No, I never did.

Q. Not at all? A. No, not at all.

Q. Didn't you complain to the circus, on a prior occasion, about the manner in which your wife's apparatus was erected? A. Yes, I did. [155]

Q. How did that come to your knowledge then?

A. Because one day when I walked into the ring and pulled my wife up on the trapeze, I went outside to the stake, and I saw the stake come out of the ground.

Q. Another time the trapeze was tangled up?

A. Yes.

Q. You complained on that occasion?

A. Yes, I did.

Q. Did you always examine to see if the trapeze was in position? A. How could I examine it?

The Court: Just answer the question.

A. No, I did not.

Q. By Mr. Combs: I take it on this particular occasion you did not examine it?

A. No, I did not.

Q. And on this particular occasion you did not look at the crane bar? A. No, I did not.

Q. In fact, the first time you ever looked at the crane bar in this matter was after you sat your wife down on the elephant tubs, is that right?

A. No, I did not even then.

(Testimony of Karl Pollinger)

Q. You did not even look at that time?

A. No.

Q. In fact, you never looked at the crane bar in this [156] situation?

A. No, I did not. May I explain?

The Court: If you care to explain what you mean.

A. I did not look at the crane bar, because the crane bar was between the flying act apparatus and I couldn't see it.

Q. By Mr. Combs: You could have looked at it if you attempted to look at it?

A. I could go inside of the ring and look up this way.

Q. You did not do that?

A. I couldn't do it during the performance.

Q. Just a minute. You didn't do it?

A. No, I did not.

Q. You watched your wife during the entire part of her performance, I presume, did you not?

A. Yes, I did.

Q. You did not observe anything unusual about the manner in which the trapeze bar swung, did you?

A. No.

Q. It swung equal and level on every swing, both forward and back and sideways, is that right?

A. Yes.

Q. Do you know when the apparatus on the 12th of September was taken down?

A. Yes, I know.

(Testimony of Karl Pollinger)

Q. When was it taken down? [157]

A. Right immediately after I carried my wife out, I heard the noise from the apparatus coming down.

Q. It was taken down immediately after the accident then, was it? A. Yes.

Q. Do you know who took it down?

A. The property men.

Q. Who are they?

A. I don't know them by name.

Q. Did you make any payments to the men who worked on your wife's rigging?

A. No, I did not.

Q. I will ask you whether or not you testified in the former trial in this matter, about January 16, 1940?

A. I did.

The Court: Were you a witness in the other case?

A. Yes, I was.

The Court: In the other trial, I should say.

A. Yes, your Honor.

Mr. Combs: Will you stipulate that the following testimony was given by this witness at the former trial, under oath, is that correct, counsel?

Mr. Marcus: This was his testimony under cross examination.

Mr. Combs: That is right.

Mr. Marcus: For what it is worth, your Honor. [158]

Mr. Combs: Everything is for what it is worth.

The Court: That statement is unnecessary.

(Testimony of Karl Pollinger)

“Q—By Mr. Garrett: Mr. Pollinger, how did you know that these particular men were attending to your wife’s rigging?

“A—I did know it, because there wasn’t any other riggers on the show.

“Q—Who were they employed by?

“A—Beg your pardon?

“Q—Who were these men employed by, if you know?

“A—They were employed by the show.

“Q—Did you pay any of them anything for attending to your wife’s rigging?

“A—Usually we give every week some tips to everyone who helps. I did also, too.

“Q—You made those payments to those men that worked on your wife’s rigging?

“A—To everyone, if they worked or not.

“Q—Did you make such payments to the men that worked on your wife’s rigging?

“A—I gave every week some money to the men that was on my rigging, and I am not sure whether I give some money to everybody that was on her rigging, because they might work on both.

“Q—You made those payments to all the riggers, is that right? [159]

“A—Yes.”

Mr. Combs: That is all.

Redirect Examination

Q. By Mr. Marcus: Mr. Pollinger, were there any other riggings in the net at the time that you came out with your wife? A. Yes, there were.

(Testimony of Karl Pollinger)

Q. Tell the jury what other riggings were in the tent.

A. There was one trapeze on the left side, and one on the right side, and one in the center, which belonged to my wife.

Q. Were any of the wires or any of the guy ropes attached to some pole over near the same proximity that your wife's wires and riggings were attached?

A. Not near to it.

Q. How far? A. The next pole.

Q. How far away was that?

A. About 25 feet.

Q. Were there any other wires attached to the same pole that your wife's rigging was attached?

A. Yes, many.

Q. What other wires and rigging were there attached to the same pole?

A. Well, there was attached for the net which protected the lion tamer, and there was the rigging from the flying act, [160] and some spotlights in the center.

Q. Were there any wires from the tent itself, to hold up the tent, on that pole?

A. Yes, there was.

Q. About how many were there all together on that same pole that your wife's rigging was attached?

A. Quite many. It is hard to say how many.

Q. What other trapeze was hanging from the main pole?

A. The trapeze from the flying act.

(Testimony of Karl Pollinger)

Q. That was fastened to the main pole?

A. Yes.

Q. What was the position of the top of the tent with reference to the crane bar, the top bar of your wife's rigging?

A. The top of the tent consisted of several layers of canvas, and it was very close together, about at an angle, about 50 degrees, and it was very dark.

Q. You mean by 50 degrees that the top of the tent comes up to an angle like this? A. Yes.

Q. Indicating an angle of about 50 degrees.

Mr. Combs: I ask that the answer "very dark" be stricken as not responsive.

Mr. Marcus: It may go out.

The Court: Yes, it may go out.

Q. By Mr. Marcus: Explain what you mean by the angle of the tent. [161]

A. It goes about 50 degrees to the top, and the top is supported from a very heavy rope connected with each pole of the tent.

Q. What was the condition of the light at the top of the tent where the crane bar was, or in that area?

A. There is no light in the top.

Q. Were there any lights on at the time that your wife performed? A. No, sir, there wasn't.

Q. From the position that you were standing, when you came in there, were you able to see the crane bar and the 8 hooks, where you were? A. No.

Mr. Combs: Just a minute. Can the answer go out, so I can make my objection?

(Testimony of Karl Pollinger)

The Court: You may make your objection.

Mr. Combs: Your Honor, I object to the question as calling for the conclusion of the witness. What he was able to do is for the jury to determine. What he did is what he may testify to.

The Court: It may go out.

Q. By Mr. Marcus: What did you do at the time that you came out?

A. I walked in front with my wife, and helped pull her up to the trapeze.

Q. Did you at that time look up? [162]

A. No, I couldn't see it.

Q. I say, did you look up? A. No, sir.

Q. Had you looked up on previous occasions?

A. No, sir.

Q. Did you see the lower bar?

A. Yes, I did.

Q. Did you see the crane bar?

A. No, I did not.

Q. Why couldn't you see the crane bar?

Mr. Combs: I object to that as calling for the conclusion of the witness.

The Court: He did not look up, Mr. Marcus; there is nothing to indicate he would know.

Mr. Marcus: Very well.

Q. Now, Mr. Pollinger, Mr. Combs has asked you questions before, on cross examination, that he came to your home last year to see your wife and yourself.

(Testimony of Karl Pollinger)

The Court: Before you answer that, I want to ask one question myself of Mr. Pollinger.

A. Yes, your Honor.

Q. By the Court: With reference to the money that you gave to the riggers, did you pay them their salary or their wages? A. No, your Honor, I did not.

Q. I believe you stated they were employed by the circus? [163] A. Yes, your Honor.

Q. By Mr. Marcus: I believe you also testified that these were tips that you gave them.

Mr. Combs: I respectfully submit that question has been asked and answered several times. Had counsel asked the question the court asked I would have no objection to it.

The Court: Mr. Combs, I want you to feel free to object to any question the court asks, because I asked what I thought was a pertinent question, but any time any counsel should feel they should object to any questions of the court they should do so, just the same as though other counsel had asked it.

Mr. Combs: Thank you, your Honor.

Mr. Marcus: I will withdraw that question.

Q. Will you tell the jury what happened at the time that Mr. Combs came out to see you?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

Mr. Marcus: Counsel himself opened it up, and stated he came there in connection—

Mr. Combs: I withdraw the objection.

(Testimony of Karl Pollinger)

The Court: You may answer.

A. Mr. Combs has tried to take my little niece away from my wife's home. If I hadn't come he would have succeeded.

The Court: What is the response?

(Record read by the reporter.) [164]

The Court: Strike it out.

Mr. Combs: If it is necessary for me to take the witness stand and deny that unmitigated falsehood I will.

The Court: It is ordered stricken out, and the jury instructed to disregard it. It has no place in this trial. If it comes to the matter of Miss Olvera walking, that is the only point that would be of any importance in this trial. If you want to question the witness with regard to that, you may do so.

Q. By Mr. Marcus: What did Mr. Combs do at the time that he came out, in connection with your niece?

The Court: Mr. Marcus, does that have to do with the alleged walking of Miss Olvera?

Mr. Marcus: It does, your Honor. I can tell the court it does.

Mr. Combs: I want to make a statement here. This has gone far enough on that score.

Mr. Marcus: If it has, it is on account of counsel's fault.

The Court: Wait until Mr. Combs has finished.

Mr. Combs: There was a guardianship proceeding pending concerning the niece of Miss Olvera. I was unable to locate the ward—

The Court: Let the court interrupt you, and if you think the court's statement is not sufficient, you may pro-

(Testimony of Karl Pollinger)

ceed further. You have made a definite statement to the jury that [165] you went there about a legitimate part of your work, and that you did not go there for any purpose regarding this case.

Mr. Combs: That is correct.

The Court: The only thing that could be of importance, and the court is not going to take up very much time on it, is whether or not Miss Olvera was able to walk. Mr. Pollinger has testified that she was not able to walk, except with the aid of crutches. Mr. Combs asked some questions indicating on that occasion she walked across the lot without the aid of her crutches. That is the only question of any importance, Mr. Marcus. I want you to keep that in mind, and if it is anything outside of that it is not of any importance, and the court will not take time with it.

Mr. Marcus: I would like to have counsel approach the bench with me.

(Discussion outside of the hearing of the jury.)

Q. By Mr. Marcus: At the time that Mr. Combs came to your home did your wife, to your knowledge, walk without her crutch or crutches?

A. No, sir, she did not.

Mr. Marcus: I believe there was a question asked as to whether or not Miss Olvera walked without her crutches in court at Long Beach, am I correct?

The Court: The answer was no.

Mr. Marcus: That is all.

Mr. Combs: No further examination of this witness. [166]

JOE AMERICA YACOPI,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Marcus: What is your full name?

A. Joe America Yacopi.

Q. Mr. Yacopi, what has been your business or occupation during your entire life?

A. Trapeze acrobat and pole artist.

Q. Where were you born?

A. South America.

Q. And you are from the Argentine?

A. Yes, that's right.

Q. What is that troupe composed of,—how many?

A. Eight.

Q. You have a little difficulty with the English language?

A. Yes.

Q. If there are some questions you don't understand, or I don't make it clear, stop me if you don't understand them.

A. Yes.

Q. How many composed your troupe?

A. Eight.

Q. Who were they?

A. My sisters and brothers.

Q. What sort of an act did you engage in with your [167] sisters and brothers?

A. Springboard act.

(Testimony of Joe America Yacopi)

Q. Explain briefly what it was.

A. There was a board, and a fellow jumped on a pedestal 30 feet high on the springboard, and did a quadruple somersault.

Q. He did a quadruple somersault in the air?

A. Yes.

Q. Did you ever do any trapeze work?

A. Yes.

Q. What kind of trapeze work?

A. I did single trapeze, and I did double trapeze.

Q. Your troupe, and the work that you did, was the only kind in the world?

A. Yes, sir.

Mr. Combs: That is objected to as calling for the conclusion of the witness.

The Court: It has been answered.

Q. By Mr. Marcus: Were you ever employed by the Ringling Brothers?

A. Sure, yes, sir.

Q. When?

A. Since 1926.

Q. You are not employed by them now, are you?

A. No, sir.

Q. What have you done in the past two years? [168]

A. I was in the Army, sir.

Q. You were in the Army?

A. Yes.

Q. You have just been discharged, have you?

A. Yes, sir.

Q. When was the last time that you did any trapeze work?

A. In Canada, and fairs in South America.

(Testimony of Joe America Yacopi)

Q. When was the last time you did any trapeze work?

A. It was in Canada, and in South America.

Q. When was the last time that you did any trapeze work?

A. It was in Canada.

Q. How long ago?

A. Before I went with the Ringling show.

Q. When was the last time you did any work in connection with the troupe?

A. In the Ringling show.

Q. How long ago was that? A. 1926.

Q. When was the last time that you did any work with the Ringling show?

The Court: He said 1926.

A. I beg your pardon. That was the last time I got into show.

Q. By Mr. Marcus: If you don't understand, stop me. When was the last time you actually worked in the circus?

A. The last time was about—I don't quite remember. [169]

Q. How many years ago, about?

A. I have been 14 years with the Ringling show.

Q. You went in 1926? A. Yes.

Q. So that would make it about 1940?

A. Yes, 1940 to 1942 I was in the Army.

Q. Were you with the Ringling show when America Olvera was there? A. Yes.

(The court after admonishing the jury here took an adjournment until 2:00 o'clock p. m. of the same day.) [170]

Afternoon Session

2:00 o'clock.

(Stipulated that the jurors were all present and in the box.)

JOE AMERICA YACOPI,

recalled.

Direct Examination

resumed.

Q. By Mr. Marcus: Now, in the year 1937, where were you employed?

A. With the Ringling shows.

Q. Was Miss America with the Ringling shows that year?

A. No, sir.

Q. Where was the Ringling show about September 12 of 1937?

A. I can't tell exactly the town it was. I don't remember.

Q. What State, if you remember?

A. I think it was Missouri.

Q. You believe it was Missouri?

A. Yes.

Q. Were you working on that date?

A. No, sir.

Q. What was the reason that you were not working?

A. The reason I was sick. I was discharged from the doctor.

Q. What did you do on September 12, 1937? [171]

A. September 12, 1937 I had a few weeks I was not doing anything.

(Testimony of Joe America Yacopi)

Q. I will ask you this question, and withdraw the last one: Did you see the accident?

A. Yes, I did.

Q. Where did it happen?

A. In Kansas; somewhere in Kansas.

Q. On or about that day were you traveling with the Ringling Bros. shows? A. Yes, sir.

Q. How did you go over to the show where Miss Olvera was working?

A. I took a taxi, a private taxi. It was a small town. I took it there, to go there.

Q. What did you do? A. I went to the show.

Q. What show? A. The Barnum show.

Q. How far away was the Ringling show, if you remember, from where the Barnum show was playing?

A. Around 40 or 45 miles; I don't know exactly.

Q. When you got there, did you know at the time that Pat Valdo was there too, at the Barnes show?

A. I knew about Pat Valdo. He went with us when we went.

Q. The same day? [172]

A. Yes, and Mrs. Bradna and I think Mickey Gray was together.

Q. Those were people in the Ringling show?

A. Yes.

Q. Who was Pat Valdo?

A. At that time Pat Valdo was director in the show; the boss; took charge of everything in the show.

(Testimony of Joe America Yacopi)

Q. He was boss of what show?

A. Ringling Bros. and Barnum both.

Mr. Combs: I object to that as calling for the conclusion of the witness, and ask that the answer be stricken. He says he was boss of Ringling and Barnum shows too. That was not the fact. It is not so disclosed by the evidence. This man is not capable of testifying to that fact.

Mr. Marcus: If he knows.

The Court: I think under such circumstances as this, where it is not a point in issue, he might make the statement, although it is just a preliminary matter. Viewed in that light only, it may be received. Mr. Combs, there is a case, Winslow vs. Glendale Light & Power Corporation, 164 Cal., which I think is just on that point. If this were an important part of the testimony, to establish the relationship of the manager, then your objection would be good. If it is just a preliminary matter, I would say it is not.

Mr. Combs: The only thing is, if the answer as to the [173] Barnes show stands, that leaves some evidence of that fact. This witness is not qualified to testify.

The Court: If you think it is important, the court will sustain your objection. It may go out.

Mr. Combs: I want to be cautious.

Q. By Mr. Marcus: What time did you arrive at the Barnes show, in Anthony, Kansas?

A. I was late. I got in there around 3:00 o'clock.

Q. Did you go to the show? A. Yes, sir.

(Testimony of Joe America Yacopi)

Q. Where did you sit?

A. I sat in the grandstand chairs, reserved chairs, in other words.

Q. What was on at the time?

A. I think it was the clown act; clown number.

Q. What followed the clown number, if you remember?

A. Exactly I don't remember. I think wire-walking.

Q. Some wire-walking? A. Yes, sir.

Q. When you came in the show did you see Miss Olvera's trapeze, or the trapeze that she later performed upon? A. Well, I don't see the trapeze.

Q. Just before Miss Olvera came on did you see anything done to her trapeze? A. Yes, I did.

Q. What was done? [174]

A. When she came in the ring I saw the trapeze set. In other words, the trapeze was pulled to one side to give room to the other actors. He put the trapeze the other way.

Q. Who did that? A. The property men.

Q. Who were the property men, do you know?

A. Yes.

Q. Who are they? What did they do?

A. He fixes all the rigging, and all of that.

Q. Speak louder.

A. He is the one who takes care of the apparatus, and all of that.

Q. Do you know who they were?

A. Yes, sir.

(Testimony of Joe America Yacopi)

Q. Who were they?

A. Somebody here in the courtroom.

Q. Someone here in the courtroom? A. Yes.

Q. Who was it? Can you point him out?

A. The man over there.

Q. Which man was it?

A. The gentleman with the glasses.

Mr. Marcus: Will you stand up, please, sir? What is his name? A. I think Franklin.

Mr. Marcus: Will you tell us your name, please? [175]

Mr. Combs: He doesn't need to give his name.

The Court: That is not proper. Is that the man you saw? A. Yes.

Q. By Mr. Marcus: What did you see him do out there?

A. He just hold the trapeze, set the trapeze.

Q. Where was it before he set it?

A. It was on the side, hanging on the side.

Q. How did it hang on the side? What kept it up?

A. There was a pulley, sort of pulley and hook in it. He pulled it to the side, to keep it out of the way.

Q. Then what happened?

A. He put it down. She came in.

Q. He put it down, and she came in?

A. Yes.

Q. Who was she? A. Miss Olvera.

Q. Did you see Mr. Pollinger in the ring too?

A. Yes.

(Testimony of Joe America Yacopi)

Q. When did he come in?

A. He came in right behind her, I remember, because he had a bathrobe.

Q. A bathrobe? A. Yes.

Q. What did she do if anything?

A. She had a small cape, and did a few dances; something like that. Then she went up. He gave the rope to her. [176] He gave the ring rope to her.

Q. Who was he? A. Mr. Pollinger.

Q. He gave her a rope? A. Yes.

Q. She went up?

A. She put her foot inside and the property man pulled up the trapeze.

Q. Then what happened?

A. She sat down on the trapeze.

Q. She did her act, did she? A. Yes.

Q. She did her performance?

A. No, she didn't went all the way through with her act.

Q. You know her act, don't you? A. Yes, sir.

Q. Have you seen it before? A. Yes.

Q. When? A. Ringling Bros. circus.

Q. For how long? A. Three years.

Q. How far through the act did she get?

A. She got up there, and when she was swinging—I don't remember how many times was swinging; the trapeze was swinging, and when she started getting up, not quite up, it [177] untangled so fast; I heard like the wire went off. I can't tell where it was, from that dis-

(Testimony of Joe America Yacopi)

tance, and she was on the ground. After, I seen the trapeze hanging on the side.

Q. Did you see anybody in the ring do anything?

A. There was the property men in there with the net, removable net, whatever they call it—removable net, a canvas net. I don't know the color, because it was dirty.

Q. When did you see these men in the ring with reference to her act? A. I beg your pardon?

Q. When did they go in the ring?

A. As soon as she started working.

Q. What did they do? A. Supposed to—

Q. Not what they were supposed to, what did you see them do? A. I saw with the net, holding.

Q. Did they stand?

A. Stand there, with the net, like that, around. It has got holes in the net, and they stick their hands in a hole, in a position to hold the net. You can't hold it straight with your feet, because in case a body fall down, it will get out of balance. Your muscles had to be relaxed from here to here.

Mr. Combs: Indicating from the waist to the middle of the thigh. [178]

A. Very tight over here. The hands should be here, and in the proper position over here.

Q. By Mr. Marcus: Was that the way they were standing? A. Yes, with the head down.

The Court: I think, Mr. Combs, that he is trying to indicate how the arms were.

Mr. Marcus: Was that the way they were standing?

(Testimony of Joe America Yacopi)

A. Yes, with the head down.

The Court: I think, Mr. Combs, that he is trying to indicate how the arms were.

Mr. Marcus: I think that is far enough, for the record.

The Court: He did it substantially as you indicated it, although, as he held his hand out, I don't believe his hands were extended quite as far as yours were extended.

Q. By Mr. Marcus: Did you see Miss Olvera when she fell down? A. Yes, sir.

Q. Did you see the net men? A. Yes, sir.

Q. Did the net move at all?

A. Not at all; positive.

Q. Where did she fall? A. On the ground.

Q. How far from the net?

A. Around two feet, or a foot and a half.

Q. About a foot and a half? [179] A. Yes.

Q. Did you see her strike anybody on the way down?

A. Yes, she must have struck somebody.

Q. Did you see it?

A. I didn't see it, because I was very careful, because I know a long time the act in the Ringling show, so I had understood.

Q. You saw the trapeze afterward, did you?

A. Yes, sir.

Q. Did you see one side lowered? A. Yes.

Q. What side was lowered?

A. The left side, which faced me.

(Testimony of Joe America Yacopi)

Q. Where were you seated?

A. Where I was seated was on the stand, because I was sitting in front of the music.

Q. Was there any music going when she fell?

A. No, not in the feature act; no music for the act, which is with everyone, a feature act never music present.

Mr. Combs: I move that that go out.

Mr. Marcus: Let it go out.

The Court: It may go out.

Q. By Mr. Marcus: Let me ask you, Mr. Yacopi. In her act, was there any music played?

A. No, sir.

Q. Can you tell us with respect to whether or not there [180] was any noise at the time she began to perform the last part of her act in the tent?

A. Not at all.

Q. Was it quiet? A. Very quiet.

Q. What did you do after she fell?

A. After she fell, naturally, I got excited, and I try to go over there, but I can't go. All the people stand up right away; everyone stand, so I say to myself—

Q. What happened to her?

A. I seen a gentleman, Mr. Pollinger, pick her up.

Q. Mr. Pollinger you saw? A. Yes.

Q. What did he do?

A. He picked her up and took her from the inside of the ring outside of the ring. Someone else helped.

Q. Did you see Miss America at any time afterward?

A. Not right away, because I tried to go down, but the ushers stopped me.

(Testimony of Joe America Yacopi)

Q. When did you see her next?

A. In the hospital.

Q. When was that?

A. A few minutes later. I took a taxi.

Q. You went to the hospital? A. Yes.

Mr. Marcus: Cross examine. [181]

Cross Examination

Q. By Mr. Combs: You were a friend of Miss Olvera at that time, were you?

A. Yes; my family too; and his friend.

Q. Also Pollinger's?

A. No, good friends; just worked together at the Ringling show.

Q. How did you happen to go over to Anthony, Kansas that particular day?

A. Why? Because I had nothing to do. I was relieved from the doctor. I was sick; my throat.

Q. Were you particularly interested in seeing Olvera's act that day? A. Yes.

Q. Did you know she was seeking an opportunity to return to the Ringling show?

Mr. Marcus: I object to that as being incompetent, irrelevant and immaterial. It is calling for his conclusion.

The Court: It appears to be. Objection sustained.

Q. By Mr. Combs: Did Miss Olvera say anything to you about her desire to return to the Ringling show from the Barnes show?

Mr. Marcus: I object to that as being hearsay.

(Testimony of Joe America Yacopi)

Mr. Combs: If she said anything to him it would be hearsay, your Honor.

Q. You say that another man other than Pollinger pulled [182] her up into the trapeze?

A. Mr. Pollinger and property man.

Q. And another man?

A. Property man; working man.

Q. Which one did the actual pulling on that occasion?

Mr. Marcus: He said both of them.

Mr. Combs: I am asking him what he is saying now.

Mr. Marcus: I object to that, counsel, as not evidence.

Mr. Combs: I am asking him the question.

The Court: Overruled.

A. The property man.

Q. By Mr. Combs: The property man?

A. Both the property man and Mr. Pollinger.

Q. They were the two who pulled her up on that occasion? A. Yes.

Q. And you saw that yourself?

A. That's right.

Q. This was a three-ring circus, was it not, at Anthony, Kansas, that Barnes was putting on?

A. I don't remember how many rings there was.

Q. You don't remember? A. No.

Q. Where did you sit?

(Testimony of Joe America Yacopi)

A. In the grandstand; I sat in the chair.

Q. Where, with relation to you, was Pat Valdo sitting? A. He was right behind me. [183]

Q. Immediately behind you, in the next row?

A. No.

Q. How far?

A. I think it was the second or third row down; something like that. I don't quite remember.

The Court: Will you read the answer, Mr. Dewing?

(Answer read by the reporter.)

Q. By Mr. Combs: Below you, in the grandstand?

A. I don't remember about that.

Q. Did you talk to him there at all?

A. No, sir.

Q. Did he talk to you at all? A. No, sir.

Q. You did see him there, though?

A. I saw him. I went to the show and I saw him there during the show.

Q. You saw him in the grandstand? A. Yes.

Q. You don't know how many acts there were in this circus? A. No, sir.

Q. Or how many rings? A. No.

Q. There was a big top, a big tent, was there not, in this Barnes show?

A. Like Cole Brothers; something like that. [184]

Q. Not as big as the Ringling tent? A. No.

Q. But a big tent?

A. I can't tell how big was the tent. It can't compare with the Ringling show, the tent.

(Testimony of Joe America Yacopi)

Q. How high was it? A. I don't really know.

Q. How high? A. What?

Q. The tent. A. I don't really know.

Q. How long was it? A. I don't know.

Q. How wide was it? A. I don't know.

Q. How big was the ring in which Olvera performed?

A. The ring?

Q. Yes.

A. I can't tell that exactly; smaller than the Ringling show, or the same size, maybe it was.

Q. How high was the trapeze hung off the ground?

A. Around 40 feet.

Q. Around 40 feet? A. I think 40 or 45.

Q. Was that a bar trapeze? A. No. [185]

Q. A crane bar? A. I call it a bridge.

Q. Can you identify it for the record? I think a bridge means the same as a crane bar.

A. Yes, somebody call it a bridge; and somebody call it a crane bar.

Q. Do you know whether or not there were any other acts going on in the tent at the time this act was going on? A. Yes.

Q. How many?

A. I just pay attention to only two acts; her and the two acts on the side.

Q. Those were going on when she fell?

A. No.

Q. They stopped when she fell? A. No.

(Testimony of Joe America Yacopi)

Q. What happened?

A. There no was any act while she was doing the feature act.

Q. There weren't any clowns in the runway?

A. No clowns there.

Q. No clowns there? A. No, I did not see any.

Q. This was a three-ring circus, wasn't it?

Mr. Marcus: I object to that as having been asked and answered. [186]

The Court: I think it has been. I think he said he did not know.

Q. By Mr. Combs: What were these other two acts going on? A. When?

Q. When Miss Olvera started her act.

Mr. Marcus: Mr. Combs, I think you misunderstood. He said there was only one act.

Mr. Combs: He said there was only one act going on when she fell?

Mr. Marcus: Yes.

Q. By Mr. Combs: There were two other trapeze performers during the time she started?

A. Two working together, but during the feature act they leave her alone.

The Court: Perhaps he doesn't understand it.

Mr. Marcus: At that time he did testify there was no other act on when she was performing her feature act. A. Yes.

(Testimony of Joe America Yacopi)

Q. By Mr. Combs: What do you mean by feature act?

A. He announces the number, the last number.

Q. Was it the last part of it?

A. I don't know what you call it, sir. The last number, after they finish the act, he announces the number by herself.

Q. I presume that this circus tent was similar to the circus tent of any other circus of about that size; it contained all sorts of paraphernalia, including blocks, [187] pulleys, chains, cables, canvas, and tent equipment, did it not?

Mr. Marcus: I object to that as assuming facts not in evidence, and calling for the conclusion of the witness.

The Court: It is rather compound.

A. There are about 40,000 different items in a circus tent.

The Court: That was not what the court had in mind. You started out saying it was about the same size. He said it was not the same size; that it was smaller than Ringling.

Q. By Mr. Combs: There were a large number of circus paraphernalia, such as blocks, tackle, pulleys, trapeze equipment, nets, and other circus equipment, in this tent, were there not? A. That's right.

Q. Is that right? A. That's right.

Mr. Marcus: I can't hear you.

A. He asked if there was wire, net, and so forth.

Mr. Combs: Mr. Marcus wants you to talk a little louder.

(Testimony of Joe America Yacopi)

Q. By Mr. Combs: I asked you this: What paraphernalia— A. I don't understand.

The Court: I don't think he understood the word "paraphernalia," but when you designated the items, Mr. Combs, I am sure he understood you.

Mr. Combs: I thought he did. [188]

Q. The wires— A. Props.

Q. Props, as you call them, they were there, as in other circuses, during the performance?

A. Yes.

Q. How many people were in the audience?

A. I don't remember.

Q. Several thousand, weren't there?

A. I don't know.

Q. You haven't any idea? A. No.

Q. There were more than just a few?

A. Naturally.

Q. Was the tent more or less filled with people?

A. I don't remember what the crowd was.

Q. Whether it was a thin crowd or a big crowd?

A. I don't remember.

Q. You don't know how many performers there were in the tent at the time, the accident occurred, do you?

A. No.

Q. But there was a band there, wasn't there?

A. Yes.

(Testimony of Joe America Yacopi)

Q. How many pieces?

A. I don't count the pieces of the band.

The Court: You are dropping your voice.

A. I don't know how many was in the band. [189]

Q. By Mr. Combs: Have you discussed this case with Mr. and Mrs. Pollinger prior to coming into the courtroom here?

A. No, sir.

Q. You never discussed it with them at all?

A. No, sir.

Q. You never talked with them about the case at all?

A. No, sir.

Mr. Combs: That is all.

Q. By Mr. Marcus: You talked to me about it, didn't you?

A. Yes, to you, but not Miss Olvera or Mr. Pollinger; I never did.

Mr. Marcus: That is all.

I am now offering the testimony of Mr. Aristo Miguel, the Indian Chief, page 189, starting at line 11, Mr. Combs.

(Questions read by Mr. Combs; answers read by Mr. Marcus.)

Mr. Marcus: This is the testimony of

ARISTO MIGUEL,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

"Q—Chief, were you working with the show in 1937?

"A—Yes, sir.

"Q—Were you at Anthony, Kansas on the date of this accident?

"A—Yes, sir.

"Q—Where were you at the time it happened?

"A—I was in the big tent.

"Q—What kind of work were you doing? [190]

"A—Property man.

"Q—Were you in the tent at the time the fall occurred?

"A—Yes.

"Q—Did you notice her act, before that?

"A—No.

"Q—You didn't see her go up on the trapeze, did you?

"A—No.

"Q—What was it that attracted your attention to the act?

"A—I just came in and I heard a snap that brought my attention.

"Q—You heard a snap, you say?

"A—Yes.

(Deposition of Aristo Miguel)

“Q—What sort of snap was that?

“A—Just like a chain.

“Q—Do you think you would recognize that snap if you heard it again?

“A—Yes, I guess I could.

“Q—Was that a metallic snap?

“A—I don’t know.

“Q—Was that a snap of metal?

“A—Yes, something like that.

“Q—Did you hear that?

“A—Yes.

“Q—Is that what attracted you to the act?

“A—Yes. I seen that and I seen her drop. That’s all. [191] That is the last I seen.

“Q—Did you look at the—

“The Court: Is that correct? Is your answer correct?

“A—Yes.

“Q—Did you see it or hear it?

“A—I hear the snap and I seen her fall, that is, half way between the ground and the trapeze.

“Q—You saw the apparatus, however, after she fell, did you not?

“A—Yes, I just took a glance at it. That’s all.

“Q—Was it swinging when you looked at it?

“A—Yes, it was swinging.

(Deposition of Aristo Miguel)

"Q—What was the condition of the apparatus at that time?

"A—Well, it looked like to me it was swinging sideways.

"Q—Well, what was the condition of the lower bar?

"A—Well, it was kind of a little lower, yes, three or four inches.

"Q—You mean one side of the bar was three or four inches lower?

"A—Yes.

"Q—Do you remember which side that was?

"A—I couldn't say. The right side, I guess it was.

"Q—How long did that bar remain up in the air?

"A—I couldn't tell you.

"Q—Do you know when it came down? [192]

"A—No.

"Q—You don't know who ordered it down?

"A—No.

"Q—What happened after she fell?

"A—They took her out. That's all I remember.

"Q—Did you help take her out?

"A—Yes, I helped take her out.

"Q—At the time, was there a net in the ring?

"A—I don't know at that time.

"Q—You didn't see the net?

"A—No.

"Q—What did you do when she fell?

"A—I ran across on the other side, where the bandstand was, between the star backs, as they call it,—

(Deposition of Aristo Miguel)

“Q—Did she fall in the ring or outside the ring?

“A—I don’t know. I couldn’t tell you that.

“Q—Where was she when you ran around?

“A—They were bringing her out when I came there.

“Q—They were taking her out when you came?

“A—Yes.

“Q—Who was taking her out at that time?

“A—Her husband, I guess—one of them. I don’t know.

“Q—Did you hear her say anything at that time?

“A—Yes. She hollered, ‘Look at my traps. They are hooked.’ Something like that. I don’t remember. That was the time I glanced up there when she was coming down. [193]

“Q—Did you go out with her?

“A—Yes. We took her out.

“Q—Who else besides you and her husband?

“A—I don’t know. There was a few other people. I don’t know.

“Q—Were there very many people around there at that time?

“A—Yes, quite a few.

“Q—Can you estimate how many people came in the ring?

“A—In the ring?

“Q—Yes.

“A—I don’t know, in the ring.

“Q—How many people were there in the same vicinity?

“A—You mean where she took her act?

(Deposition of Aristo Miguel)

"Q—That is right.

"A—Maybe four or five or six. Something like that. Everybody was excited, so—

"Q—Was Miss America conscious all the time?

"A—It seem like to me, no.

"Q—You don't think she was?

"A—She was just saying about the hook. That's all.

"Q—I mean, she was talking, wasn't she?

"A—That's all she said, about the hook.

"Q—How long did Miss America remain outside the tent?

"A—After she come out?

"Q—Yes.

"A—Well, I guess about fifteen or ten minutes; some- [194] thing like that; fifteen or twenty minutes.

"Q—Then what happened?

"A—We put her on a stretcher and we carried her out to the automobile—

"Q—Will you talk a little louder, please?

"A—We carried her out to the automobile, and they couldn't put her in the automobile, so they called an ambulance.

"Q—She went away in the ambulance, did she?

"A—Yes.

"Q—And you remained there?

"A—I remained.

"Q—You did not go to the hospital?

"A—No.

(Deposition of Aristo Miguel)

“Cross Examination

“Q—You were a property man, is that correct?

“A—Yes, sir.

“Q—And how long had you been with the Barnes show?

“A—Since 1934.

“Q—Since 1934?

“A—Yes, sir.

“Q—On that particular day, did you engage in the activities of a property man?

“A—I don't know what you mean.

“Q—All right.

“A—Explain it to me a little more. [195]

“Q—On that particular day, did you set up props?

“A—Yes.

“Q—What did you do in that connection?

“A—Well, I am an outside prop. You see, I don't work on the inside.

“Q—You were outside, then, at the time the accident occurred?

“A—No, I had just come in.

“Q—You had just come in?

“A—To watch the show, yes.

“Q—Where were you?

“A—On No. 1 ring, I think.

“Q—At No. 1 ring?

“A—Yes, on the back side of the bandstand.

(Deposition of Aristo Miguel)

"Q—The bandstand was between you and Miss Olvera?

"A—No. The bandstand sits here, and what you call the main ring sets in the middle.

"Q—Is that No. 1 ring?

"A—I don't know if they call it No. 1 ring.

"Q—Well, you knew you were at the No. 1 ring. That was where it was?

"A—The main entrance coming in.

"Q—The main entrance coming in. The center entrance around No. 1 ring?

"A—The ring where I was standing was the main ring. There was no seats there. [196]

"Q—Were you on the main side of the ring?

"A—I was on the side where no seats were.

"Q—The main entrance?

"A—I came into the main entrance.

"Q—And you were more or less standing on the side at the time?

"A—No, I was where the star backs was.

"Q—You were not sitting down?

"A—No. There were no seats there. They didn't put them up that day, some how or other.

"Q—Then you stood where the star backs should be, at that time?

"A—Yes.

"Q—And that was within about 10 feet of the circus entrance to the tent. is that right?

"A—No, about fifteen or twenty. Pretty close to Miss Olvera's stand.

(Deposition of Aristo Miguel)

“Q—Where was Miss Olvera’s act at that time? Was it in the first ring, where you stood, or beyond that?

“A—It was in the middle ring.

“Q—It was in the middle ring?

“A—Yes.

“Q—About how far away from you where you stood at that time?

“A—Fifty feet.

“Q—From the point where you stood? [197]

“A—Yes.

“Q—And you were outside of the outer track, around which horses and parades occur in the circus inside the big top, weren’t you?

“A—In the big top, yes.

“Q—All right. The band was approximately opposite the middle ring, wasn’t it?

“A—No. Right in front of it, I guess.

“Q—Right in front of the middle ring?

“A—Yes.

“Q—So that the band was more or less between you and the middle ring, wasn’t it?

“A—No. It was at the side of me. The band was on the side of me.

“Q—On which side?

“A—On the left. I was on the right side of the band.

“Q—Was the band playing at that time?

“A—Yes, the band was playing at that time.

“Q—What were they playing, do you remember?

“A—I don’t remember, no.

(Deposition of Aristo Miguel)

"Q—They were playing all through the act, weren't they?

"A—Yes.

"Q—And yet you heard that snap? You are sure you heard that snap?

"A—I heard something snap.

"Q—You heard something snap? You couldn't say that it [198] was Miss Olvera's trapeze that snapped, could you?

"A—Well, she fell at that time, so I don't know.

"Q—Couldn't you say that you heard a snap?

"A—That is what brought my attention, yes.

"Q—About how loud was the band playing?

"A—Well, they play sometimes soft and sometimes play loud.

"Q—It was loud enough to be heard in the whole circus tent, wasn't it?

"A—I guess it was, yes.

"Q—How many people were in the band?

"A—I don't know. About eighteen or nineteen, I guess.

"Q—And they are all wind instruments, aren't they?

"A—Yes.

"Q—Trumpets?

"A—Yes, trumpets.

"Q—And other wind instruments? And there were other things going on at the same time, were there not?

"A—Yes, at the same time.

(Deposition of Aristo Miguel)

“Q—At the same time Miss Olvera did her act, there were other acts going on, weren’t there?”

“A—Yes. I just came in at that time to see her fall. That’s all.

“Q—There were perhaps fifty or more people doing things; some of them with mechanical devices and some of them without mechanical devices, at that time, were there not? [199]

“A—Not fifty.

“Q—How many were there?

“A—I couldn’t recall the number, but there weren’t that many.

“Q—Well, there were twenty or thirty; around twenty or thirty?

“A—I guess something like that.

“Q—Were there any animals in the ring?

“A—Not at that time.

“Q—Not at that time. But there were other trapeze in operation, weren’t there?

“A—Yes.

“Q—You are familiar with the clap that a trapeze artist somethings gives at about the time he is going to be caught by another person, aren’t you? Have you heard that clap?

“A—No, I haven’t.

“Q—Well, you have heard that sort of a noise around a circus tent, haven’t you?

“A—I can’t get that.

(Deposition of Aristo Miguel)

“Q—Well, don’t try, then. Let’s ask another question. Have you ever heard chains and other objects or other mechanical devices rattle around a circus tent?

“A—Oh, yes.

“Q—In fact, animals shake chains and make a noise like the clash of a chain, don’t they?

“A—Yes. [200]

“Q—So that you couldn’t say that that clash of a chain, that you say you heard, emanated from Miss Olvera’s trap, could you?

“A—I just glanced up there. I couldn’t say.

“Q—Did you go right to Miss Olvera’s side when you saw her fall?

“A—No, I didn’t go right to her side after she fell, no.

“Q—When did you first go there?

“A—When they brought her outside.

“Q—When they brought her out of the tunnel? You first went to her side when they brought her out of the tunnel, is that right?

“A—When they brought her out of the ring, yes.

“Q—Well, let us go back again. You stood in the tunnel, is that right?

“A—No; not in the tunnel. Near the tunnel.

“Q—Near the tunnel. Did you run right over to Miss Olvera’s ring?

“A—No; I didn’t run over.

“Q—You remained where you were, didn’t you?

“A—I remained there a few minutes, and then went around.

(Deposition of Aristo Miguel)

"Q—What do you mean by a few minutes?

"A—Two or three seconds.

"Q—Then you went around the ring?

"A—Yes, and they brought her out.

"Q—Well, they were bringing her out when you first got [201] to her side?

"A—Yes.

"Q—How far had they brought her? Fifteen or twenty feet from the ring?

"A—They brought her from where she fell to the bandstand.

"Q—And that was about how far from the point where she fell?

"A—Well, I couldn't tell you how far that is.

"Q—Was it twenty feet or thirty or fifty feet?

"A—No; more than that.

"Q—More than fifty feet?

"A—Not more than fifty. About thirty feet.

"Q—That was the first time you heard her talk?

"A—I heard her scream when she fell, but I didn't know whether it was her or the audience.

"Q—Somebody screamed, but you don't know whether it was the audience or her?

"A—Yes.

"Q—The first time you heard her talk was when she was at the bandstand?

"A—She was hollering when I came up.

"Q—At that time she said, 'Look at my traps!'

"A—Yes.

(Deposition of Aristo Miguel)

"Q—What did she do? Anything else?

"A—No. She wanted somebody to look after her traps. [202]

"Q—Did you go and look after them?

"A—No.

"Q—Did you assist in carrying her out?

"A—I assisted in carrying her out, and there hung the trapeze swinging.

"Q—How far away from that trapeze that was swinging were you when you looked up at it?

"A—About thirty or forty feet, or thirty feet, or something like that.

"Q—And there it was just swinging back and forth?

"A—Yes.

"Further Cross Examination

"Q—Mr. Miguel, did you enter the big top that day from the menagerie tent or through the main entrance?

"A—The menagerie tent. I went over to get some ice cream.

"Q—I didn't get that.

"A—I entered from the menagerie tent.

"Q—I didn't hear that yet.

"A—I entered from the menagerie.

"Q—You are familiar with the big top, the tent they used that year, are you not, in 1937? Do you remember the size and shape of it?

"A—I don't know the size of the tent.

(Deposition of Aristo Miguel)

“Q—Do you remember it was not round; it was ob-long? It was long from one end to the other? [203]

“A—Yes.

“Q—And the two entrances were from where the bible seats were, were they not, the blue-backed seats?

“A—Yes.

“Q—The blue-backed seats are at the end, is not that correct?

“A—Yes.

“Q—So you were entering from one of the ends when you entered from the menagerie tent, is that correct?

“A—Yes; to the main big top.

“Q—And you stood there at the entrance where the bible seats or the blue-backed seats would have been if they had been up that day? Is that correct?

“A—Yes.

“Q—In other words, you were between the tent and outside of the arena track at one extreme end of the tent, is that correct?

“A—Yes; I was out of the arena track.

“Q—So that between you and the center ring was the No. 1 ring, is that correct?

“A—Well, I don't know how those rings are numbered. I always put it No. 2 as the main ring.

“Q—The end ring?

“A—Yes.

(Deposition of Aristo Miguel)

"Q—You were outside of the arena track at the end of the tent there, and the first ring in front of you was the end [204] ring, is that correct?

"A—Yes; the end ring.

"Q—Was Miss Olvera performing in that ring?

"A—No. She was in the center ring.

"Q—There was a trapeze performance going on in the end ring, is that correct?

"A—Yes.

"Q—To your right and behind the center ring as you came in there, there was a bandstand, is that correct?

"A—The bandstand in the center, yes.

"Q—Directly behind the center ring?

"A—Yes.

"Q—Do you have any idea of the distance from the seats at one end of the big top, the distance from there to the center ring?

"A—No; I don't.

"Q—You haven't any idea as to what it would be in feet?

"A—Oh, about fifteen or twenty feet, I guess.

"Q—Would you say your recollection is it was only fifteen or twenty feet?

"A—That is, from the star backs to the center ring.

"Q—It is fifteen or twenty feet from the star backs to the arena track, is it not?

"A—I couldn't tell you.

(Deposition of Aristo Miguel)

"Q—Then there is the distance across the arena track, is there not? [205]

"A—Yes.

"Q—Then there is the distance from the arena track to the end ring, is there not?

"A—Yes.

"Q—And there is the distance across the end ring, is there not?

"A—Yes.

"Q—And that end ring is at least 50 feet wide, is it not?

"A—Yes. I think about 40 or 50 feet, or something like that.

"Q—And then there is the distance from the end ring over to the center pole, is there not?

"A—Yes.

"Q—And then there is the distance from the center pole over to the center ring, is there not?

"A—Yes.

"Q—All that distance was between you and this performance in the center ring, is that correct? Did you get that question?

"A—No, I didn't get that very good.

"Q—Will you read the question, please?

"(Question reread.)

"A—Well, I was about 50 feet, I guess, from the center ring.

"Q—But you were at that time standing where the blue [206] back seats would have been at the end of the tent?

"A—Not blue seats. Star back seats; reserved seats.

(Deposition of Aristo Miguel)

"Q—They are the ones at the extreme end of the tent?

"A—Yes.

"Q—Right at the entrance from the menagerie tent?

"A—Yes.

"Q—And there was between you and the center ring the distance from the star back seats to the arena track; is that correct?

"A—About 50 feet.

"Q—To the arena track?

"A—Yes.

"Q—Oh, I see. You were about 50 feet from the arena track, is that your testimony?

"A—No; the center ring.

"Q—How far were you from the arena track?

"A—I was right close; about 10 feet or 15 feet.

"Q—Then there was the distance across the arena track, is that correct?

"A—Yes.

"Q—And the distance to the end ring; is that correct?

"A—You are talking about the end ring. I am talking about the center ring.

"Redirect Examination

"Q—You say you were approximately 50 feet from the center ring? [207]

"A—Yes.

"Q—That's all."

(After admonishing the jury the court here took a short recess.)

Mr. Marcus: Call Dr. Tasker.

DAIN L. TASKER,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Marcus: Will you state your full name, please, Doctor? A. Dain L. Tasker.

Q. Doctor, are you a duly licensed and practicing physician and surgeon in this county?

A. Yes, sir.

Q. How long have you been?

A. I have practiced in this city since January, 1898.

Q. Do you have any specialty, sir?

A. I am a roentgenologist in the X-ray department, Wilshire Hospital.

Q. How long have you been such roentgenologist?

A. I have been in charge—I believe the hospital now is 20 years old, and I have been there all the time.

Q. Have you done any other roentgenologist work?

A. Yes, I have had a private practice in my office, in [208] the Auditorium Building, at the corner of Fifth and Olive.

Q. How long have you been practicing, did you say?

The Court: Since 1898.

Q. By Mr. Marcus: How many X-rays would you say you have examined, as a roentgenologist, since that time? A. Over a hundred thousand.

(Testimony of Dain L. Tasker)

Q. What is a roentgenologist, Doctor?

A. One who specializes in the use of the X-ray, either for therapy or for diagnosis.

Q. Did you take some X-rays of Miss Olvera?

A. I did.

Q. Can you pick out the ones that you took, Doctor?
I show you Exhibits 3 and 4.

A. These are not mine. These are the ones, that have my title on.

Q. Doctor, will you read these X-rays for us at this time, and if you can, illustrate to the jury while you are reading them.

A. These films are dated 5-13-38. They consist of a pair of what we call stereoroentgenograms. They give the third dimension quality in the X-ray; and these are mine. This is what is called the anterior-post direction; that is, from the front of the body to the back, in order to give the detail of the spine, bringing it as close as possible to the film.

These films show a change in density of the body of the [209] third upper lumbar vertebrae—the first, second and third, and also a moderate change in the depth of the intervertebral disks; that is, the cartilaginous cushions between them. The lateral view, made at that time, gives a more detailed delineation of the change in form of these vertebrae. The first, second and third lumbar vertebrae show an increased density of their upper portion, and a marked change in the contour, forcing them out, and compressing them from the top to the bottom, characteristic of what is known as a compression frac-

(Testimony of Dain L. Tasker)

ture; that is, a crushed fracture, from end-on force, either from above or below, and which is known by the term compressible fracture, because you can see the intervertebral discs here are changed in character in comparison with the bony ones below and above.

This increased density in this area shows that a repair reaction has occurred in there to consolidate the injured area, and that is the characteristic reaction of nature in the repair of a compression fracture. That just about covers the ground.

Q. Doctor, what is the purpose of the disk in the spinal column?

A. The disk is a shock absorber.

Q. What does it do, so far as the individual is concerned?

A. It is a portion of the supporting column, and there is a disk between each pair of vertebrae throughout the length of the column. They are in the movable portion of [210] the spinal column, and, as I said before, they are shock absorbers.

Q. When the disk has been damaged or destroyed, what effect does that have upon the movement of the spine in that particular area affected?

A. It limits the movement very materially.

Q. Do the X-rays indicate to you that the disks have been damaged to the extent that there is a limitation in the movement of the spine?

A. It definitely indicates there is damage to the disk, and whether that disk is by compression protruded forward or backward can only be told by clinical symptoms,

(Testimony of Dain L. Tasker)

not by visualization in the film, because of the cartilage it shows no greater gravity, no greater density, than the surrounding soft tissue; therefore, you do not see it in this foramen, where the nerves come out from the spinal cord; you do not see it there. In fact, the probabilities are that it has been pouted out, either dorsal or lumbar, backward or forward, or to the side. That can only be due to the effect of this injury to the nerves passing through that area.

Q. What nerves pass through the area affected?

A. In the spinal cord, just about here, at this first lumbar interspace, the large trunks go down to the lower extremities, passing out of these various openings through the lumbar region, down to what is called the equina cauda, or "horse's tail" in the sacrum. [211]

Q. That would be the bone in a human being, down in here?

A. In the sacrum, back of the pelvis.

A Juror: Your Honor, may I ask a question?

The Court: You may.

A Juror: How many vertebrae have been injured?

A. Three; the first, second and third.

Q. By Mr. Marcus: To what extent has there been any injury to the vertebrae themselves, Doctor?

A. They have a severe compression of their upper halves; you can see the lines here in each one of them, where that compression ends.

Q. What effect does that have upon the operation of the vertebrae, or the purpose for which we have vertebrae?

A. First of all, it changes the contour, produces posterior curvature, called kyphosis.

(Testimony of Dain L. Tasker)

Q. Do you mean curvature of the spine?

A. Yes.

Q. Is that so indicated by the X-ray?

A. Yes. You can see here the curve is not symmetrical. There is a quick change, beginning at the first lumbar and ending at the third. The curve is toward the back, that is, the dorsal region. Toward the front is the lumbar region.

A Juror: What direction do you get the view we have?

A. This is a lateral view. This is profile.

Q. By Mr. Marcus: What is the purpose, Doctor, of the vertebrae themselves; that is, the first, second and third [212] lumbar vertebrae.

A. They are a portion of the supporting spinal column.

Q. If they are injured, what effect does that have, first, upon one's posture?

A. It changes it, because the weight support naturally depends upon the integrity of the parts that constitute the framework.

Q. What effect does it have upon the nerves going through the vertebral column?

A. It may or may not have an effect upon the nerves

Q. If they do have that effect, Doctor, what would that effect be?

Mr. Combs: I object to that as assuming facts not in evidence; not a proper hypothetical question; and not taking into consideration all the elements involved.

(Testimony of Dain L. Tasker)

Mr. Marcus: I am going to ask him both sides, to be fair: If it did not, there would be no effect, am I correct?

Mr. Combs: Ask him in the proper manner.

Mr. Marcus: There is already a foundation laid on that by Dr. Steele Stewart's testimony. He so testified, at the time, I believe, there was a hemorrhage within the vertebral column, if I remember his testimony correctly.

The Court: I don't recall it, Mr. Marcus.

Mr. Marcus: I will pass it for the moment. I will find it in the record. [213]

Q. Doctor, are there any spurs on this X-ray?

A. No spurs other than the protruding margin where the compression took place; but there are no spurs in the sense we ordinarily see spurs in that region of the spine.

Q. You have indicated a portion of the first, second and third lumbar vertebrae, extending beyond the lower portion of each one. What does that indicate to you, Doctor?

A. The upper portion of the vertebra, this is the area of compression. It has been crushed. Naturally it has got to go somewhere when it is crushed, and it pouts out.

Q. When it is crushed, what does it do to the vertebra itself? What effect does it have upon the fibers or the cells of the vertebra?

A. The structure of the vertebral body is sponge-like in character, like a sponge compressed; and the cellular structure, in this case there was a collapse of the cellular structure in the upper portion of the vertebral body.

(Testimony of Dain L. Tasker)

The Court: Doctor, can you point to one of the vertebrae showing evidence of collapse?

A. In the first lumbar you see the profile margin comes up to about here, about half of its depth, running directly through the center. The rest of this shows a different form; its upper half is protruded forward, out of line. There has been a change in its superior upper surface. There is an increase in density, in the upper half of that vertebra, characteristic of repair; solidification of the [214] vertebra in order to maintain its functional capacity, to support weight.

Q. Is there solidification of the vertebra itself, or is it in connection with some other vertebra?

A. No, it is strictly within its own substance.

Q. Will you indicate to the jury where the spinal column is?

A. You can see a succession of vertebral bodies, which represent the spinal column.

Q. Within these vertebrae do you find the spinal cord?

A. No, the spinal cord is behind these vertebral bodies, in the spinal canal.

Q. Will you indicate to the jury if there has been any injury in the vicinity of the spinal canal?

A. The vertebral bodies, in their posterior relationship to the spinal canal, do not show any marked changes. The compression starts from the posterior superior margin, angles forward and downward.

(Testimony of Dain L. Tasker)

Q. For the benefit of those who are laymen, so far as the medical profession is concerned, when you say posterior superior you mean the backward upper part?

A. The backward upper portion, yes. The intervertebral disk here has evidently been markedly injured, because a portion of it has disappeared to a substantial depth. Where that structure has gone to, whether it has either been by straight out absorption, or it has been pouted out into the [215] posterior canal, the spinal canal, has pouted forward, nothing shows on this radiograph.

Q. It is not there?

A. It is not there. It has been injured, and I assume it went into the canal.

Q. What effect would that have upon the individual?

Mr. Combs: I object to that as assuming a fact not in evidence.

Mr. Marcus: There can be no evidence of something that is no more there.

The Court: If there is no evidence of it, what is the use of taking up the time?

Mr. Marcus: If it went into the canal, and caused some nerve change, or some anesthesia, which the other doctor testified to, I submit the evidence here would indicate and support the theory of Dr. Steele Stewart.

Mr. Combs: I object to that upon the ground that it assumes a fact not in evidence.

The Court: Overruled. You may answer. Let me make this suggestion, Mr. Marcus; using the testimony of the other doctor, if you desire, as a basis for your hypothetical question, propound to him a question indicat-

(Testimony of Dain L. Tasker)

ing, if there should appear anesthesia over a certain surface of the body, then on that basis, what might the condition be?

Q. By Mr. Marcus: If an examination disclosed there was an anesthesia in the right leg of Miss Olvera, would that [216] indicate anything to you, Doctor, from the X-ray?

Mr. Combs: That is objected to as not a complete statement of the facts; assuming facts not in evidence; not a complete statement of the facts in evidence or sufficient upon which to base a hypothetical question.

The Court: It is only to a certain portion of the right leg. The anesthesia did not appear on all the surface.

Q. By Mr. Marcus: In certain part of the right leg, would that indicate anything from an examination of this X-ray?

Mr. Combs: Same objection; incompetent, irrelevant and immaterial; no proper foundation laid.

The Court: Overruled. You may answer.

A. In cases of this nature, where there are areas of anesthesia below the site of the injury it is commonly considered that the injury has involved to some degree some of the roots of the major nerves leaving the spinal column in the site of the injury, and, therefore, the clinical evidence furnished by the neurologist's examination, coupled with the visual evidence of injury, constitutes a basis for the diagnosis of definite injury involving the nerve trunk—nerve roots, rather.

(Testimony of Dain L. Tasker)

Mr. Combs: I ask that the answer be stricken upon the ground that no proper foundation has been laid. The question assumes facts not in evidence.

The Court: Motion denied. [217]

Q. By Mr. Marcus: Doctor, will you indicate to the jury where the roots, or where the nerves emanate from the spinal canal?

A. They emanate from the spinal canal through what are called the foramina.

Q. Would you indicate from the third down to the first about what areas those nerves serve?

A. You can see these areas along like shadows. These represent large openings through which the nerves emanate from the spinal canal, and they come out to join and form large trunks or plexus, we call them, to go down and control the sensation and motion of our lower extremities.

Q. Do the nerves from the canal that you have indicated for the first, second and third lumbar vertebrae, serve the lower portion of the body?

A. Yes; the neurologist usually traces out the areas of pain and hypersensitivity, or anesthesia, by methods of touching a member, and from that he finds the site of the pain, and comes back to the areas by which these areas are supplied by nerve fibers.

Q. Is there any repair that can be made to the spinal canal itself if it has been injured?

A. Nature always makes the repair of injured structures. Therefore, there are no two cases alike; there cannot be, because forces impinging upon the structures

(Testimony of Dain L. Tasker)

injure them, and therefore compression influences pouting of the intervertebral [218] disks, and in many of these fractures that are present they have no neurological symptoms with them.

Q. Is there any known repair outside of nature itself to the spinal column?

A. If we have a compression injury, followed by involvement of the nerve fibers, producing pain and anesthesia, the surgeon frequently steps in and does an operation, fixing the joints to take pressure off the area. That is a frequent orthopedic operation on the nerve involved.

Q. If the pressure is taken off, what effect does that have upon the vertebra itself, Doctor?

Mr. Combs: I presume you mean in this particular case?

Mr. Marcus: Certainly.

A. It stabilizes the individual, and gives him a firm foundation, instead of insecurity.

Q. Can you give us the details of that operation?

A. I am not an orthopedic surgeon.

Q. Does an involvement such as you have indicated here, of these three vertebrae and the nerve fibers, produce pain?

Mr. Combs: I object to that as calling for the conclusion of the witness, and not within this expert's professional knowledge.

The Court: Overruled. You may answer.

A. That is a problem in the individual cases, as I have just testified. Some of these compression fractures

(Testimony of Dain L. Tasker)

have no symptoms whatever other than the one. During the period [219] of repair, when they are weak and hurt, their stability is not good, but they make an excellent repair, and there are no after effects.

Q. You mean by surgical repair?

A. No, by nature's repair.

The Court: Do you limit your question as to pain?

Mr. Marcus: Yes.

The Court: After the repair, or at any time?

Q. I should say first before the repair, Doctor, before the repair has taken place.

A. There is always pain previous to the repair, because you have inflammatory swelling and pressure, and gradually, as the repair is accomplished, the swelling, and so forth, which constitutes a scaffolding around the repair area, is taken down by nature, and we no longer have the pressure influence. But if the injury has gone to the extent of pushing the bone or cartilage, and so forth, into the spinal aperture, then the pressure will be constant, and remain until the surgeon gives him support.

Q. That, under the circumstances you have indicated, will have to be limited to surgery?

A. That will have to be done surgically.

Q. That cannot be done by nature's repair?

A. No, it could not be.

Q. Do you have any other X-rays of your own, Doctor, which would be of assistance in explaining this matter? [220]

A. No, I haven't. There are two sets here.

(Testimony of Dain L. Tasker)

Q. Doctor, I think your tab goes on this.

A. That's right. The other ones I have. These films were made 7-27-38 and consist of stereograms in the antepost direction with respect to her pelvis, and a lateral exposure with respect to her lumbar vertebra.

Q. Doctor, will you look at the pelvis X-ray? Will you please read that X-ray?

A. This radiograph shows a density in the area just above the hip joint, and that may or may not have pathological significance. That is, it might be something that is pathologically a natural development in this individual. It is not necessarily diseased. Over on the opposite side is what is called the iliac fossa of the ileum, which is the wing bone of the pelvis. There is a density lying in here. The significance of that I do not know, because I haven't the history that goes with it. Otherwise, the pelvis looks intact, in good condition, and there is nothing characteristic of anomalous development, injury, or pathology, other than the one I have mentioned.

Q. Doctor, assume that Miss America Olvera on September 12, 1937, fell from a trapeze, approximately 22 to 23 feet in the air, to the ground on her back, the lower portion of her back, would this X-ray indicate anything to you?

Mr. Combs: That is objected to upon the ground that no proper foundation has been laid; assuming facts not in [221] evidence, and a thoroughly improper hypothetical question. He states an isolated group of facts, not taking all of the facts involved in the situation, and

(Testimony of Dain L. Tasker)

most of them do not include symptom facts of any kind or nature whatsoever. All of those are omitted from the so-called hypothetical question that he asks regarding the picture.

Mr. Marcus: I submit, your Honor, that the doctor said he had no history. With that in mind, I framed the question which would give him the history of this fall.

Mr. Combs: The question does not give the history, your Honor.

The Court: What would you add to it, Mr. Combs?

Mr. Combs: I would add all of the symptoms; all of the historical facts and the data. Of course, I don't purport to be able to draw his hypothetical question for him. I do know sometimes these questions take many pages of carefully drafted paper. Certainly in this case there is more involved than the mere sentence which he has given.

The Court: Hypothetical questions may be short as well as long. Some are very long; some short. Here he is assuming only that the person whose photograph was there X-rayed has fallen 22 feet, and has fractured—

Mr. Combs: —on her back. That's all the facts he has given. I respectfully submit that is very inadequate.

The Court: I think there should be an assumption as to whether or not there was any previous condition. [222]

Q. By Mr. Marcus: And that there was no previous indication of any injury that she had suffered to her back or pelvis prior to that date.

(Testimony of Dain L. Tasker)

Mr. Combs: I object to that upon the grounds heretofore stated, as well as it is assuming facts not in evidence.

The Court: I think the objection is good.

Mr. Marcus: You may answer.

Mr. Combs: Did you sustain the objection?

The Court: I intended to sustain it.

Mr. Marcus: Pardon me.

The Court: Proceed.

Mr. Marcus: I will reframe the question.

Q. Doctor, assuming that the individual represented by this X-ray was a trapeze performer, on or about September 11, 1937, while performing as a trapeze artist in the air on a bar approximately 22 feet from the ground, while lifting herself on the bar on one leg, and swinging back and forth on the trapeze, at the same time fell from the trapeze, and in falling grabbed both of her legs at the knees, and landed on the ground on her back, and that the person so falling had not at any previous time suffered any injury to her back or pelvis, under those circumstances, Doctor, would the densities in these X-rays indicate anything to you?

Mr. Combs: I object to that as assuming facts not in evidence.

The Court: Is there any evidence, Mr. Marcus, that Miss [223] Olvera had never been injured at all in her back or pelvis?

Mr. Marcus: Yes, your Honor, she so testified on cross examination. One accident was when she fell in

(Testimony of Dain L. Tasker)

New York on her face, she said that she had injured her wrist.

Mr. Combs: There is not any evidence to the effect that she had not ever before suffered any injury to her back or pelvis. That is not the only objectionable feature to that question. It is unintelligible.

The Court: I think the objection should be sustained.

Mr. Marcus: Mr. Combs, these are your X-rays. Will you stipulate that we may introduce these at this time?

Mr. Combs: So stipulated.

The Clerk: Do you want them marked as one exhibit?

The Court: Let them be marked as Plaintiff's Exhibit 5.

Q. By Mr. Marcus: Doctor, will you read that X-ray?

A. This appears to be a lateral exposed radiogram of the plaintiff's lumbar region, visualizing the changed structure in the first, second and third vertebrae, just repeated with respect to the films which I made. There is nothing additional here with respect to the changes in form or any characteristics indicating anything of a nature different than that to which I have already testified regarding the previous films.

Q. The same condition is indicated to you, Doctor?

A. The same.

(Testimony of Dain L. Tasker)

Q. We have another pelvis here, Doctor. Will you look [224] at it?

A. This presents the same shadows as those in the ones that I made; that is, a density on the right, and another over on the left. I don't know the significance of them. I merely know that they are there.

Q. Is that density that you see in the X-rays, and which you have pointed out, a normal condition?

A. We don't usually see anything of that kind, no.

Q. Will you examine this one, Doctor?

A. This is similar to the one I just examined.

Q. Do you find that same density in the pelvis?

A. Yes, the same. These are merely taken at slightly different angles. The tube has been shifted a little; therefore, it shows enough change to indicate to me that the films are probably stereoscopic films for the third dimension.

The Court: Doctor, does the examination of these pelvis X-rays indicate anything pathological?

A. Not of any active character, no, sir.

Mr. Marcus: You may cross examine.

Cross Examination

Q. By Mr. Combs: You would say, Doctor, would you not, that these pelvic densities, if they were fractures, are completely healed?

A. Yes; and there would be evidence of places in the ileum where they came from. There is no evidence any place [225] in the bony structure of the pelvis where these fragments came from.

(Testimony of Dain L. Tasker)

Q. What fragments are you talking about?

A. A shadow; densities.

Q. These were fragments?

A. I don't know what they are. They are foreign shadows in there. The history would be the only way to get at that.

Q. You are not able to state that they are fractures?

A. No, I am not.

Q. Or that the pelvis had been fractured?

A. There is no evidence of any fracture to that pelvis.

Q. And it indicates that the pelvis is normal?

A. That pelvis shows no evidence of having been fractured.

Q. Would you say it never has been fractured?

A. I would say, so far as I can interpret it, I don't think it has ever been fractured.

Q. Is there any improvement indicated in the latter group of X-rays as against the former group?

A. The condition is essentially the same in both cases. I think they have reached a static condition; reached the end of the repair reaction.

Q. That repair action is nature's course of repairing a damaged member of the body, is that right?

A. Yes. [226]

Q. Frequently, in the case of human beings who are injured, that process sets in and makes a complete repair, does it not?

A. Yes. By a complete repair, that does not mean that it is in the condition it was before the injury.

(Testimony of Dain L. Tasker)

Q. That's right, but frequently bones that have been broken are stronger after repair than before?

A. They might be, where a big amount of callus is thrown out.

Q. There is no evidence, and from your examination you are not able to make any statement, of any bone or matter of any kind or nature that has passed into the spinal column, are you? A. No.

Q. From these X-rays, and from your examination, you would state then there is no such condition, is that right?

Mr. Marcus: I object to that as assuming facts not in evidence. This man is a roentgenologist, and called for that purpose.

Q. By Mr. Combs: I will qualify the question. There is no condition of that nature displayed by your examination, or the X-rays involved?

Mr. Marcus: I object to that. No proper foundation has been laid. He never testified that he examined Miss Olvera.

The Court: He is referring, the court believes, to the examination made of the X-rays. Is that correct? [227]

Mr. Combs: That's right.

Mr. Marcus: If it is limited to that, there is no objection. I understood him to say that he examined Miss Olvera.

The Court: You may answer.

A. I made no physical examination of Miss Olvera. All I know is what I see in the films. My testimony is strictly upon the shadows in the films.

(Testimony of Dain L. Tasker)

Q. By Mr. Combs: That would require you to state that these films do not show any foreign matter of any kind or nature in the spinal cavity, is that right?

A. Spinal canal?

Q. Spinal canal.

A. No, I couldn't certify that there was anything in there at all.

Q. And your X-rays do not disclose anything in there?

A. No, they do not disclose anything.

Q. That is likewise true of your examination in relation to the so-called pouting out of these disks that rest between the various vertebrae, is it not?

A. I did not catch the first of your question.

Q. Your answer respecting the examination of these X-rays would be in relation to the so-called pouting out of the disks between the vertebrae—there is no evidence in the X-rays of such condition?

A. The only evidence is in the rise and depth of the [228] disk area. The disks have to go somewhere when they are compressed. That is, they go outside, backward, forward, or some place, or will undergo a gradual absorption as a result of the injury.

Q. So you would have to speculate on that phase?

A. That is a problem, in the examination.

Q. The X-rays do not disclose the condition of those disks?

A. No. The only way we could do that would be by injecting idiol, that is, iodized oil, into the disk, and watch it while studying under a fluoroscope.

(Testimony of Dain L. Tasker)

Q. The compression of several vertebrae; as indicated by these X-rays, could occur from a fall in which the individual falling either struck upon her head or shoulder, or other extremities, is that right?

A. It would have to be a vertical force.

Q. More or less vertical?

A. It would have to be sufficiently vertical to produce the flexation of the body, to get the force toward the front.

Q. You came to that conclusion, I presume, because of the fact that the outside portion of the spine—I guess you call it anterior, or do you call that posterior, that is the back?

A. That would be posterior.

Q. The posterior part of the spinal canal in this case is not compressed, is that right? [229]

A. Yes, she has what we call a dorsal curve; that is, a posterior curve.

Q. It is the anterior portion of these three vertebrae alone that is compressed?

A. So far as we can see in the film.

Q. I take it that is what guides you to the conclusion that the fall involved was one which involved the doubling of the body more or less forward?

A. It has to do that, in order to compress these bodies in the way they are exhibited in the film.

Q. Have you any way of determining within a period say of six months, the length of time in which a fracture to the back occurs, similar to that?

A. No.

(Testimony of Dain L. Tasker)

Q. Can you tell us where in the X-ray, the first examination, the first group of X-rays, the spinal canal itself ends?

A. I can tell you approximately where it ends, yes. You understand, there is not anything shown in the film where it ends. This is of my own knowledge of anatomy. It ends probably just about in this space, where this disk is thinnest, in the first lumbar interspace.

Q. The first lumbar is immediately below that point, is that right?

A. The first lumbar is immediately above.

Q. The first lumbar is immediately above that point? [230]

A. Yes.

Q. I take it that the compression indicated in this picture includes that particular vertebra?

A. Yes, the first, second and third are included.

Mr. Combs: That is all.

Mr. Marcus: Counsel and I have stipulated that Exhibit No. 1 may be introduced in evidence.

Mr. Combs: Yes, that is agreeable, without the requirement of a foundation.

The Court: These may be received and marked as Plaintiff's Exhibit No. 6.

Mr. Marcus: May this be handed to the jury at this time, your Honor?

The Court: If you desire.

(Whereupon an adjournment was taken until Thursday, January 6, 1944, at 10:00 o'clock a. m.) [231]

Los Angeles, California, Thursday, January 6, 1944;
10 A. M.

The Court: The members of the jury are all present.
So stipulated?

Mr. Marcus: So stipulated.

Mr. Combs: So stipulated, your Honor.

Mr. Marcus: This morning our testimony is going to
be that of the prop boy, page 627 of the transcript.

CHARLES JOHNSON,

called as a witness on behalf of the plaintiff in rebuttal, being duly sworn, testified as follows:

(Questions read by Mr. Combs; answers read by Mr. Marcus.)

“Q—Mr. Johnson, what was your business or occupation during the year 1937?

“A—I was a property man.

“Q—With whom?

“A—Al G. Barnes Circus.

“Q—And what were your duties in connection with such employment?

“A—My duties were to take props into the ring and help set up the various minor acts, such as tables, like Mr. Pollinger’s act, and things like that.

“Q—Are you acquainted with Miss America’s rigging?

“A—Not very much.

“Q—Did you ever see it before?

“A—Certainly. I carried it in every day.

“Q—Are you acquainted with this trapeze? [232]

“A—Yes, sir.

(Deposition of Charles Johnson)

“Q—Is this the trapeze you carried in?

“A—That is the box and trapeze.

“Q—Referring to Plaintiff’s Exhibit 4.”

Mr. Combs: I suppose that is another exhibit now?

The Clerk: That is No. 1 in this case.

Mr. Marcus: We will call it 1 in the question.

The Court: That is satisfactory to the court if it is to you, Mr. Marcus.

Mr. Marcus: Yes.

“Q—Referring to Plaintiff’s Exhibit 1. Where was this apparatus kept?

“A—It was kept out in the back yard.

“Q—Was it kept with any other apparatus there?

“A—Yes, quite a lot of other apparatus next to that.

“Q—Was that kept with any other apparatus used in the snow?

“A—Yes, it was.

“Q—when was this rigging and apparatus set up?

“A—It was set up as soon as the top went up and the poles went up. The first things the riggers would do, they would set the rigging.”

The Court: Mr. Combs, I believe the apparatus was marked 1.

Mr. Marcus: Let us amend the question retroactive as to 2. [233]

The Court: No. 1 is the trapeze apparatus.

(Deposition of Charles Johnson)

“Q—On the 12th of September, 1937, do you know who set up this rigging?

“A—One of the riggers I know was a man called Whitey, who had been given charge of the rigging—that particular rigging.

“Q—Did you see him erect this rigging?

“A—No, I did not.

“Q—Did you see him erect it on September 12, 1937?

“A—Yes, sir, I seen him erect it several times.

“Q—On September 12, 1937, the date of this accident?

“A—Yes, sir.

“Q—You observed him put this up?

“A—I did.

“Q—How long had he been with the show?

“A—I should imagine shortly—five weeks, four or five week; I am not sure.

“Q—Do you know of your own knowledge whether he had had any other previous experience prior to the erection of Miss America’s rigging?

“A—I do not.

“Q—Did he continue the season with the show?

“A—He did not.”

Mr. Marcus: I withdraw the objection.

“Q—Are you acquainted with Philip La Bay?

“A—No. [234]

“Q—Are you acquainted with Blackie Williams?

“A—Blackie Wallace?

“Q—Blackie Wallace. I think that is his show name.

“A—Blackie Wallace, I think he was a rigger.

(Deposition of Charles Johnson)

"Q—On the date of this accident did Blackie Wallace do anything in connection with Miss America's rigging?

"A—I don't know.

"Q—You don't know whether he did or not?

"A—No.

"Q—Are you acquainted with Karl Pollinger?

"A—Yes, sir.

"Q—How long have you known him?

"A—For the entire season of 1937.

"Q—On the date of the accident can you tell us what time Mr. and Mrs. Pollinger came out into the tent?

"A—They came in the tent a few minutes before the act went on.

"Q—Had there been any previous acts prior to the time their performance came on?

"A—Yes, sir.

"Q—And before they came on can you tell us whether or not there was anything done with their apparatus?

"A—I do not know.

"Q—Or with her apparatus?

"A—I can't.

"Q—Do you know when it was that her apparatus was [235] put in place?

"A—In the morning it was put in place.

"Q—Do you know when it was lined up or trued up?

"A—I don't know, because I worked in another ring. I didn't watch it.

(Deposition of Charles Johnson)

“Q—You didn’t watch it and you don’t know what happened. Did you see them come out that afternoon for the performance, September 12, 1937?

“A—Yes, sir. I was standing there where they always come out.

“Q—In the erection of Miss America’s rigging, did you see Howard Mentz there?

“A—Howard wasn’t on the lot.”

Mr. Combs: The answer was stricken. We ask that the answer referred to, which counsel has just read, be stricken. That was stricken the last time.

The Court: If the record so shows—

Mr. Marcus: That may go out.

The Court: Let us one talk at a time. If the record so shows it may go out. Are you both agreed that the record does so show?

Mr. Combs: Yes.

Mr. Marcus: That is correct.

The Court: The jurors are instructed to disregard it.

“Q—Will you answer the question, please?

“A—I did not observe him. [236]

“Q—Do you know what his condition was at that time?

“A—Yes, sir. He had a broken leg and had his foot in a cast.

“Q—Do you know who was supervising the erection of the rigging on that day?

“A—Mr. Ringling, or rather Miller is his name.

(Deposition of Charles Johnson)

"Q—Chandler Miller?

"A—Chandler 'Ringling' Miller.

"Q—Will you please tell what you observed about Mr. and Mrs. Pollinger at the time they came out to perform and at the time Miss America performed her act?

"A—Well, I noticed the time Mr. Pollinger went over to hold the web for Mrs. Pollinger. I saw her go up.

"Q—You mean the web? Does that mean a rope?

"A—Yes; we call it a web in the circus—up to perform her act. Of course, when she went up there was a trapeze act in each one of the other rings, and these two acts terminated before she started hers. When she started her act, you see, the property men just stood in our rings. If we wish we can go to the side and watch the act. However, I stayed in my ring and watched the act, from there. I always watched the acts. She went up in the trapeze and Mr. Pollinger swung her with the web. After she was swinging fairly good she slowed down a little and started to get up, and the first thing I knew she was down.

"Q—As she stood up to take a bow? [237]

"A—She doesn't take a bow; she swings and then she goes into her act.

"Q—You mean she was standing up?

"A—She was standing up, and when she stood up she fell out.

"Q—She wasn't on her knees, was she, when she fell?

"A—No, she wasn't on her knees when she fell, because she was swinging on the trapeze.

(Deposition of Charles Johnson)

“Q—Did you see the men in the ring with the net?

“A—Yes, sir; eight property men holding the net.

“Q—Do you remember their names?

“A—One was Tony; I don’t know his last name. Another boy that held the net was Puddy; another boy by the name of Joe; and four or five others. There were eight holding the net.

“Q—How large was this net?

“A—About 8 by 8, I should imagine.

“Q—And how large was the ring?

“A—The ring would be about 30 feet in diameter; something like that.

“Q—When she fell did the net move at all?

“A—The net did not move; no.

“Q—How far from the net did she fall?

“A—Well, as far as I remember, one of the boys claimed that she hit him when she fell.

Well, I would say she fell about one foot from the net. [238]

“Q—Did you see her after she fell?

“A—Yes, sir, I saw her.

“Q—Was she unconscious at any time after she fell?

“A—She wasn’t unconscious. She was screaming and it seemed to me like she said, ‘The trap threw me. The trap threw me.’

“Q—At any time that you observed her after she fell and before she was taken out of the tent was she unconscious?

(Deposition of Charles Johnson)

"A—I saw her when they carried her out and she was screaming. I saw her outside a few minutes afterwards, and she had a doctor with her, setting her arm.

"Q—Was she unconscious?

"A—She wasn't. She was talking to me.

"Mr. Marcus: You may cross examine.

"Cross Examination

"Q—By Mr. Combs: When were you first employed by the Barnes Circus?

"A—I joined the Barnes Circus here in Los Angeles early in 1937.

"Q—Early in 1937?

"A—Yes, sir.

"Q—In Los Angeles?

"A—In Los Angeles.

"Q—You did not join it, then, the first of the season?

"A—I did not.

"Q—What were your duties as a rigger? [239]

"A—I wasn't a rigger; I was a property man.

"Q—You were a property man?

"A—Yes.

"Q—What did you do in that connection?

"A—I helped set up the tents. I helped carry in such things as her trapeze and other acts and helped with the cage and different acts.

"Q—You were a friend of Karl Pollinger's, were you?

"A—I wasn't a friend. I never knew anyone—

(Deposition of Charles Johnson)

"Q—Did you meet him first, I mean, while you were on the show?

"A—I never knew any show people until 1937. I had never been with a circus in my life.

"Q—But you became acquainted with Karl Pollinger on the show and you became friendly with him at that time, didn't you?

"A—I became to know him very well, yes, sir.

"Q—And became an intimate friend of his?

"A—No, sir. I worked with the circus.

"Q—But you were an intimate friend of Karl Pollinger, weren't you?

"A—My boss, Mr. Williamson, told me to help him with his act.

"Q—No. Were you an intimate friend of Karl Pollinger?

"A—I wouldn't say an intimate friend.

"Q—Well, you helped Karl Pollinger with his act, [240] didn't you?

"A—Yes, sir.

"Q—You helped him with his act?

"A—I helped him with his act.

"Q—Putting up the Eiffel Tower and the airplane motors and screws and those things?

"A—Yes.

"Q—You devoted most of your time to that act, didn't you?

"A—No; about an hour or so to set it up.

(Deposition of Charles Johnson)

"Q—It only took an hour or so to set it up?

"A—Yes, sir.

"Q—It didn't take three or four hours to set it up?

"A—No, sir.

"Q—Just a little over an hour?

"A—A little over an hour.

"Q—And you assisted every day in the erection of that piece of apparatus?

"A—Yes, sir.

"Q—And that was one of your regular duties with the show?

"A—That was one of my duties, and my boss told me to do it.

"Q—Who was your boss?

"A—Blackie Williamson.

"Q—Blackie Williamson? [241]

"A—Correct.

"Q—What was the occasion for you going out and seeing Mrs. Pollinger in the tent, after the accident?

"A—Well, quite a few of us men went out there. Our act was over at that particular moment. I went out in the back yard. She was out in the back yard, and the back yard was full of people.

"Q—How many, other than yourself, went out there at that time?

"A—Blackie Williamson was out there. Quite a few prop hands. Quite a few performers.

(Deposition of Charles Johnson)

“Q—Was there any duty you had to perform, after Miss Olvera’s act that day, in the big top?

“A—Certainly, when the next act was on; but they had no next act after that. That made it vacant in the center ring after that.

“Q—Normally what did you do after Miss Olvera finished her act?

“A—We had no act in our ring. I went out and took a smoke.

“Q—You went out and took a smoke?

“A—Yes.

“Q—So that was the occasion for your being able to go out and see her, outside the tent?

“A—Yes, sir.

“Q—Can you tell me whether or not the band was playing [242] when the trapeze act was going on?

“A—Let’s see. No, sir, I don’t think the band was playing.

“Q—You don’t think the band was playing. Could you tell me how many people there were in the band?

“A—There is about fifteen or eighteen people, I imagine.

“Q—Fifteen or eighteen people. Can you tell me what entrance Miss Olvera made? What entrance did she come in?

“A—The center entrance.

“Q—Right adjoining the bandstand?

“A—Yes, sir, right in front of the center ring.

(Deposition of Charles Johnson)

“Q—Explain just exactly where you were standing when the accident occurred.

“A—At the center pole, close to the center pole in the No. 1 ring.

“Q—How many feet from Miss Olvera’s trapeze?

“A—About fifty feet, I should imagine.

“Q—About fifty feet. You are sure the band wasn’t playing at that time?

“A—I says I wasn’t sure.

“Q—You are not sure. The band might have been playing, is that it?

“A—Well, I can’t say for sure.

“Q—Well, it might have or might not have?

“A—It generally plays on the entrance. I don’t know [243] whether it stopped or not.

“Q—The net that you saw on that day was the same net as always was used in Miss Olvera’s act, wasn’t it?

“A—Yes, sir.

“Cross Examination

“Q—Mr. Johnson, what were you doing in the No. 1 ring?

“A—I was a property man in the ring, sir.

“Q—What were your duties there?

“A—My duties were to help different acts, help guy out ropes; to help riggers guy out traps and different acts; such things as that.

(Deposition of Charles Johnson)

"Q—Did you have anything to do with the act that was going on there while America Olvera was performing in the center ring?

"A—No, sir. It was a trapeze act—

"Q—That was a trapeze act?

"A—Yes, sir. The rigging was a one-man job.

"Q—And all you did was to carry in things and put them on the ground, is that right?

"A—That is right.

"Q—When did that act in the No. 1 ring start, that was on when America Olvera's act started in the center ring?

"A—Pardon me?

"Q—Was there an act on in the No. 1 ring while America Olvera's act was on in the center ring?

"A—The act was on when America Olvera starting into [244] the ring.

"Q—A single trapeze act?

"A—Yes, sir. Then when she does her trapeze acts in the No. 1, the act in the No. 3 ring terminates. In other words, she had a feature attraction there.

"Q—You say that terminated before she stood up on her trapeze?

"A—No, not until she got up.

"Q—What did she do when she got up?

"A—She started to stand up and the next thing I knew she was down. She fell."

Mr. Marcus: We will now read the testimony of Jack Lysaught, beginning on page 617 of the transcript of the former trial.

JACK LYSAUGHT,

called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

(Questions read by Mr. Combs; answers read by Mr. Marcus.)

"Q—Jack, where do you live?

"A—At the present time?

"Q—Yes.

"A—1201 South Main.

"Q—How old are you?

"A—21.

"Q—Were you employed in the Barnes show? [245]

"A—Yes, sir.

"Q—When?

"A—1938—1937 and 1938.

"Q—Is that the time Miss America was with the show?

"A—Yes, sir.

"Q—How old were you at that time? About 19?

"A—Yes, sir.

"Q—And what kind of work were you doing with the show?

"A—I was a rigger.

"Q—Had you had any previous experience as a rigger before you entered the show?

"A—Not as a rigger. I had worked as a prop man on different shows.

"Q—But as a rigger, I mean.

"A—No.

(Deposition of Jack Lysaught)

"Q—Did you do any work on her rigging?

"A—No, sir. All I did was drop the rigging.

"Q—At the end of the performance?

"A—Yes, sir.

"Q—Do you know who actually put up her rigging on the 12th day of September, 1937?

"A—Mr. LaBay and a fellow we called Whitey. I don't know his name.

"Q—And when was this rigging erected?

"A—During the course of setting the show up. That was before the arena went up; before the show was ready to [246] start, or anything."

Mr. Combs: I think we skip over to 619, line 5?

Mr. Marcus: That's right.

"Q—Who was actually working there on the rigging on September 12, 1937?

"A—On Miss America's rigging, you mean?

"Q—Yes.

"A—Blackie Wallace, that is, putting the rigging up. I can't say he guyed the rigging up.

"Q—Blackie Wallace? Is that Philip LaBay?

"A—Philip LaBay, yes.

"Q—And a fellow by the name of Whitey?

"A—Yes, sir.

"Q—Anyone else working on her rigging?

"A—No, sir.

"Q—Did you observe them put up her rigging?

"A—Yes, sir.

(Deposition of Jack Lysaught)

"Q—When was that done?

"A—That was in the morning, right after we got in town. The top was up, we had the flying acts up and then her rigging came next.

"Q—Do you know Howard Mentz?

"A—Yes, I do.

"Q—Was he working on the rigging that day?

"A—No, sir.

"Q—Did he have anything to do, so far as you saw on [247] that day, in connection with the erection of this rigging?

"A—No, not of that rigging.

"Q—Do you know whether he was there at any time during the erection of that rigging?

"A—He did not supervise it, no, not that day.

"Q—Did you have a conversation with Howard Mentz that day?

"A—Coming back from the cookhouse after the show was over, yes.

"Q—Was that prior to the evening show?

"A—Yes, sir.

"Q—And was that subsequent to the afternoon show?

"A—Yes, sir.

"Q—Was anyone else present there?

"A—No, sir, there wasn't.

"Q—What was Mr. Mantz' condition at that time; physical condition?

"A—He had a sore foot; a broken foot. I think he had one crutch; I am not sure.

(Deposition of Jack Lysaught)

“Q—You had a conversation with Howard Mentz, you say?”

“A—Yes, sir.”

Mr. Combs: We skip clear down to—

Mr. Marcus: Page 622, line 3.

“Q—Did you see Howard Mantz in Hollywood in 1938?”

Mr. Marcus: Skip down to line 26.

“A—Yes, sir, I did. [248]

“Q—Did you have a conversation with him at that time?”

“A—Not pertaining to the accident, no, sir. We was working together at the time—

“Q—Did you observe the accident in question?”

“A—Yes, sir, I did.

“Q—Where were you standing at the time?”

“A—No. 2 center pole.

“Q—Did you see Miss America and her husband come out?”

“A—No, sir, I never.

“Q—When did you first observe them?”

“A—I first observed her when she was on her rigging.

“Q—And did she perform an act at that time?”

“A—Yes, sir, she did.

“Q—Did you see her fall?”

“A—Yes, sir, I did.

“Q—Will you relate whether or not there was a net underneath the rigging?”

“A—Yes, sir, there was a net.

(Deposition of Jack Lysaught)

"Q—How large was that net?

"A—About 8 by 8 square.

"Q—Do you remember who was holding the net?

"A—No, sir, I don't. There were eight prop hands.

"Q—They were prop hands?

"A—Yes, sir.

"Q—Do you know whether or not Philip LaBay was holding the net? [249]

"A—He wasn't.

"Q—He wasn't?

"A—No, sir.

"Q—Did you observe where these net men were holding the net?

"A—Under the rigging.

"Q—And do you know whether or not at the time she fell that they moved the net at all?

"A—No, sir, they never moved it.

"Q—Did they move it?

"A—No, sir.

"Q—Did you observe the entire act?

"A—No, sir, I never.

"Q—Did you observe the moment that she fell?

"A—Yes, sir.

"Q—Did you observe the apparatus afterwards?

"A—No, sir, I never.

"Q—Do you know where she fell with reference to the net?

"A—Ahead of the net; in front of the net.

(Deposition of Jack Lysaught)

"Q—How far from the front of the net?

"A—I would say a foot or two.

"Q—And at that time do you know whether or not the net was moved at all?

"A—It wasn't moved; no, sir.

"Q—Did you see her after she fell?

"A—No, sir, I never. [250]

"Q—Did you hear her say anything after she fell?

"A—No, sir; she was screaming. That's all I know.

"Q—You heard her screaming?

"A—Yes, sir.

"Q—Was Miss America unconscious at that time?

"A—No, sir.

"Q—Was she unconscious at any time after she fell?

"A—They carried her out. I don't know whether she got unconscious after she left the tent or not.

"Q—Did you see her husband there?

"A—Yes, sir.

"Q—Do you know who picked her up?

"A—No, sir. The men were all crowding around her, and I had to drop the rigging right away. I seen I couldn't be of any assistance, so I didn't go over.

"Q—You say they dropped the rigging immediately?

"The Court: He said, 'I had to drop the rigging.' That is what you said?

"A—Yes, sir.

(Deposition of Jack Lysaught)

“Q—By Mr. Marcus: You say you dropped the rigging immediately?

“A—Yes, I dropped one side of it and the other man dropped the other side.

“Q—Did you see who directed you to drop the rigging?

“A—No, sir. We did it that way at the end of every show. [251]

“Q—Did you hear any whistle?

“A—No, sir, I never did.

“Q—Did you observe her condition after they took her out?

“A—No, sir, I never. She was screaming.

“Q—Did you hear her say anything as they took her out?

“A—No, sir, I never.”

Mr. Marcus: The plaintiff rests at this time, your Honor.

The Court: The jury will be excused. They will retire to the jury room. Bear in mind the admonitions of the court heretofore given you, and return when called by the bailiff.

Mr. Combs: At this time, if your Honor please, the defendants in this action desire to make a motion for a non-suit on the following grounds, and for the following reasons:

That the contract sued upon in this case is a contract made under the laws of the State of Florida, and contains a clause releasing the defendants, or the contract-

ing parties, from any and all liability for damages which have occurred, or might occur, to any participant under the contract. That there has been in this case no negligence whatsoever, and no gross negligence either—neither negligence nor gross negligence, proved, by either of the defendants in this action.

And this motion, your Honor, is made jointly and [252] severally for the defendants.

The Court: Mr. Combs, pardon me for interrupting you. I believe now the matter should be considered only on the basis of gross negligence in view of the pleadings. There may be some part of this motion to amend that has not been determined. I think that should be done first before you proceed with your motion.

Mr. Combs: Yes. At this time I make a motion for leave to file an amendment to the answers of both defendants, of which I am impelled by the amendment by interlineation of the amended complaint at the outset of this trial. I have submitted to the court that amendment to the answer, which sets up the statute of limitations. I argue to the court that the amendment allowed changes the entire cause of action and sets up a new cause of action, to-wit, gross negligence, which is long since barred by the statute of limitations.

Mr. Marcus: In connection with counsel's request for permission to set up the purported defense of the statute of limitations, I respectfully suggest to the court that that permission to file the amended answer be denied and stricken for this reason: That it is adjudicated law of the State of California that such defense is without merit, for this reason: There is no change in the theory of plaintiff's complaint. The only thing, that is required,

is for us to show a greater degree of care required of the [253] defendants. In other words, there is no change in the theory of the action; only the degree of proof. I believe that is important, not only with respect to gross negligence, but our Supreme Court has gone so far as to state—

The Court: Wait a minute. We will take plenty of time; if you desire to consult with the gentleman sitting there it is entirely satisfactory to the court, but I think you should give attention to this matter. Do you wish to take time?

Mr. Combs: No.

The Court: I don't know who the gentleman is.

Mr. Combs: Robert E. Corkery, an attorney admitted to practice in this court.

The Court: Do you desire to have him associated with you as counsel in the case?

Mr. Combs: Yes, I do.

The Court: The court grants the motion. I did not know who Mr. Corkery was, or his association in the matter. I thought it was important that attention be given to Mr. Marcus' argument.

Mr. Combs: Yes. Thank you.

Mr. Marcus: The plaintiff filed an amendment to their complaint, which was based on negligence, and alleged wilful misconduct, which is a considerably greater degree of care required of the defendants, and a considerably greater degree of negligence that must be shown by the [254] plaintiff than for gross negligence. The defense, likewise, was interposed at that time, that the action was barred by reason of the statute of limitations of this State. In passing upon that our Circuit Court

determined that there was no change in the policy of the action. That there was only a greater degree of proof required, and dismissed that defense as without merit.

This is not a change in the theory of the action whatsoever. It is simply a greater degree of proof, and I don't even believe, your Honor, under the new federal court rules, that it is even necessary to allege gross negligence, if from the pleadings it may be determined what the nature of the action is or the demand sued upon; that that is sufficient under our new rules. It is only the degree of proof, and that is for the court to determine. The Appellate Court determined in this instance that it was necessary, not to allege—nor do I believe there is any such statement in the opinion, that it was only necessary for us to prove, and that the court was required, under the terms of this contract, to give an instruction on gross negligence.

The Court: You are taking up time unnecessarily as to what you believe it is not necessary for you to do, because you have asked the court to permit you to amend, and you have amended. I think there is one phase of your motion to amend which has not been ruled upon, that is under advisement, [255] and that should be determined now. The court asked you if you desired to amend; you stated that you did; then you indicated why you believed the amendment should be made by interlineation. You realize it was presented to you, and you immediately acted upon the question of the court. Later you said there were some other parts that should be amended by interlineation. I think one of those has not yet been determined. Do you recall which one of those it was?

Mr. Marcus: Yes, your Honor.

The Clerk: Two.

The Court: Mr. Clifton say that there are two places.

Mr. Marcus: Paragraph 7, your Honor, line 26. If I am not mistaken with respect to the court's ruling, the court did order the amendment with respect to line 26. Then I suggested to your Honor, in view of the allegation of negligence and carelessness, in line 28, that it might be advisable to insert the word "gross" before the words "negligence and carelessness."

The Court: Was there any other place?

Mr. Marcus: Then there was a place in paragraph IX, line 4, which reads now as follows: "That as a direct and proximate result of the negligence and carelessness." I suggest to your Honor that it should be amended to read "That as a direct and proximate result of the gross negligence and carelessness." [256]

The Court: Your motion to amend in the respects to which you have referred, is granted. Now, the question is whether or not there should be an amendment to the answer. Mr. Combs, there was no defense of the statute raised in your original answer?

Mr. Combs: That is correct.

The Court: While I can agree with Mr. Marcus that, as the court views the law, there is no change in the cause of action, notwithstanding that the court is going to permit the amendment proposed to be filed. It is quite possible that Mr. Marcus' view and the court's view may be in error. I hardly think it can so be here under the California law, but I think Mr. Combs should have the right to file the amendment, and it is so ordered. Now, Mr. Combs, you may proceed.

Mr. Combs: I will not repeat the portion of my motion already made. I would assume that is agreeable to the court, although it was apparently premature.

The Court: It is unnecessary to do it.

Mr. Combs: Upon the grounds further, that the injuries suffered by the plaintiff in this matter were the result, if they were the result of the negligence of anybody, of the contributory negligence of herself.

On the further grounds that the injuries involved in this matter were the result of an unavoidable accident.

On the further ground that the injuries suffered, and the [257] accident referred to in this matter, were the result of the negligence, if there was any negligence, of the plaintiff's own employees.

On the further ground that the injuries in this accident were the result of a course of action adopted by the plaintiff with full knowledge of the nature and character of her acts and her work, and that she assumed the risk and the hazards of her employment. First, she assumed the risks and hazards of her employment as a trapeze artist in general; second, if there were any additional risks occurring as a result of the operation and management of her equipment by the Barnes Circus, that she assumed the risks and hazards of that additional situation, whatever they may have been.

Upon the further ground that the amended complaint, the amendment thereto allowed at this trial, did not state facts sufficient to sustain a claim against these defendants.

Upon the further ground that the evidence adduced by the plaintiff shows affirmatively that her own negligence, and that of her servants and her husband, contributed proximately to cause the accident sued on herein.

Upon the further ground that the terms of the contract of the parties hereto place upon plaintiff the duty of maintaining the apparatus under the clause reading:

"The artist shall furnish and maintain in first class condition at his expense all paraphernalia and equipment. The artist constructs and presents his acts with personnel [258] of troupe under his exclusive control and supervision in all particulars. The artist assumes exclusive supervision regarding inspection of the act and premises, and agrees to keep the premises safe, and warrants that all persons appearing or practicing in the act are conversant with and suitably fitted for the same."

Upon the further ground that in attempting to avoid the effect of the clause just referred to, and the contract of the parties, she is attempting to vary the terms of that contract, or escape from the obligations imposed by it by her own oral testimony.

May I summarize, your Honor, in addition, and by way of argument in support of the points I have just made, that the course of conduct of the plaintiff, and the course of conduct of the defendants in the maintenance and erection and so forth, of the various apparatus used in this matter, were certainly performed in conformity with ordinary skill and diligence, and the evidence so shows; and there can be no gross negligence involved in the conduct of the defendants in relation to that by virtue of the uncontradicted and conclusive evidence.

That places an unfair burden upon the defendants and calls them to account for something extraordinarily remarkable and out of the realm of normal conduct. That relates not only to the claimed defect or situation regard-

ing the trapeze itself, but as well to the question of the net. [259]

I respectfully call the court's attention, in that regard, to the rules of physics involved in that situation.

I believe that adequately covers my motion. I had one other point in mind, but it must have slipped me. I have certainly covered all the grounds, as I view it, for a motion for a non-suit, and on those grounds, your Honor, we respectfully submit we are entitled to a non-suit in this case.

Mr. Marcus: The matters that counsel has advanced for the motion at this time, for dismissal, are properly matters of defense. If they are raised, as counsel has raised them, at the close of the plaintiff's case, it is, in effect, requesting the court to state that there is no evidence of gross negligence at this stage of the proceedings. Therefore, plaintiff has not established a *prima facie* case.

Furthermore, counsel has suggested to your Honor, in his motion for a dismissal, that it was an unavoidable accident; and furthermore, that if there were negligence, that it was plaintiff's own employees that caused such accident, and therefore, she is bound by their own acts. I will pass that with just one word of comment, your Honor, because there is absolutely no evidence in this record at this time that the persons whom plaintiff claims—or the persons who are shown by the evidence to have erected the rigging, and without contradiction at all in the record—were plaintiff's employees. [260]

Counsel has also suggested, your Honor, that Miss Olvera assumed the risks of her employment and if she was injured by reason of such risks that she cannot

recover. That is not the law as set down by the appellate court in this case. Such an instruction was requested at the close of plaintiff's case on the last occasion, and the court at that time stated the instruction was properly refused.

"Olvera might recover though she knew the danger and peril of the work she was engaged in and chose to accept them, unless the danger and peril were the proximate cause of her injuries."

So far as the record is concerned, it has not been shown that the trapeze was not erected properly; that it came down, and that the net was not operated in the manner that it should have been. Upon that evidence, the opinion states as follows:

"There was evidence from which the jury could infer that Barnes had assumed those incidents of Olvera's act which consisted of furnishing and 'maintaining' parts of its 'equipment' and 'apparatus,' namely, the trapeze on which she performed and a net and persons to maintain it beneath her trapeze to catch her in safety in the event of an untimely fall; and that there was either gross or ordinary negligence in setting up and maintaining the trapeze whereby her fall was occasioned, and on the part of the net holders in failing [261] to hold it under her, causing the injuries and the damages to her for which the jury gave its verdict.

"Were these all of the contract provisions involved, the judgment would have to be sustained." [262]

On a motion for dismissal, it is my opinion of the law, your Honor, that there must be an entire lack of evidence at all in the record to support plaintiff's position

that there was gross negligence. We already have the law of the case. The law has been enunciated that there was either gross or ordinary negligence. The evidence is the same; counsel has not pointed out or suggested to your Honor any difference in the evidence today than it was at the previous trial. In other words, I may suggest to your Honor that there was one additional witness called, and we believe the evidence today is much stronger than it was at the last trial.

I do not believe that I will take any more of the court's time. I feel that there is no merit in the suggestion at this time that there is no evidence in the record upon which the jury can reasonably infer that there was gross negligence.

Mr. Combs: In response to counsel's argument, I first want to state that, as I view and summarize the evidence, there are vast differences on the weaker side so far as the plaintiff is concerned. In the evidence in this re-trial the particular details of those differences is such that I am not going to attempt to summarize it at this time. Suffice it to say that in my judgment as a lawyer there is not one single thing which appears in the record from which it might be inferred that the defendants ever had [263] any reason to suspect any such thing as the plaintiff claims to have occurred, unless it be through her own misfortune, by virtue of an unavoidable accident, or her own negligence, by virtue of the nature of her contract, or by virtue of her own connection with her act.

That is likewise conclusively true with the operation of the net itself, and I sincerely believe that it would be an impossibility for eight men, moving in unison, in less

than a second and a half from the time the body starts to fall, to dash over and catch the falling body in the net. I do not believe it is worthy of consideration, and certainly it is not worthy of consideration in relation to gross negligence. Even if eight men could have moved in unison to catch the body in the net from the time it commenced falling, they might have differed in judgment as to whether or not she was going to fall outside or not, if she was so close from the edge of the net of not over a foot.

So I can't agree that there is any gross negligence involved in that kind of a situation. As a matter of fact, the appellate court decision is very weak on that subject in so far as it supports the question of any negligence in the former record. I have been very careful during the trial to bring out points to obviate the expression of Justices Denman and Healy, who said not that there was evidence of negligence or gross negligence, but there was evidence from which it might be inferred; a very weak [264] expression to be indulged in by an appellate court. Justice Mathews stated:

"There was no evidence warranting a finding that the injuries sustained by appellee Overa were proximately caused by the negligence—gross or ordinary—of appellants or either of them. Appellants' motion for a directed verdict should have been granted."

Counsel, in reading that instruction which we submitted regarding the subject of the excuse from liability on the grounds of contractual assumption of risk in this case did not complete the expression of the court. The court proceeds to inform us, I regret to say, that our instruction was faulty, and that is why they sustained

your Honor's ruling refusing to give that particular instruction, stating the respects in which it was faulty. That was part of our instruction No. 14.—“The instruction was properly refused.”

This is the one relating to the contract:

“In this case if you believe from the evidence that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which she was engaged at the time of the injury and understood the same, and then chose to engage in the work which exposed her to such perils and danger, she cannot recover, and in determining the question whether or not the plaintiff knew, appreciated and understood the perils and danger of the work [265] in which she was engaged, you will consider the evidence as to plaintiff's age and mentality, and as to her previous experience with a trapeze or similar apparatus, and all other evidence bearing upon said issue.”

That instruction was properly refused because we omitted “Olvera might recover though she knew the danger and peril of the work she was engaged in, and chose to accept them, unless the danger and peril were the proximate cause of her injuries. The requested instruction is fatally defective because not containing some such words after the words ‘she cannot recover’ as ‘if her injuries were caused by such danger and peril.’ ”

In that same instruction which we are submitting at this time to the court we are following the advice of the

appellate court. I am frank to admit that neither Mr. Murphine nor I saw the matter as the appellate court saw it. They certainly have the last say, and we gladly accept their conclusion as to what should have been the form of the instruction. So that I argue that Miss Olvera's assumption of risk, whether it flowed from a contractual obligation in itself, or from her knowledge and experience, in the assumption of that kind of business or occupation, is an element which should entitle us to relief from any possibility of liability in this case, in the very opinion of the judges who heard the matter in the appellate court.

In conclusion I will state that I am not going to [266] summarize the evidence. The court knows it as well as I do. I will say, if in Judge Mathews' opinion there was no evidence of either gross or ordinary negligence, on the first trial, that opinion would certainly stand for the present situation, and I am confident that Judges Denman and Healy would have come to the conclusion, in the present retrial, that there was no evidence from which it could be inferred that gross negligence could have been committed by the defendants.

The Court: That is based on your reading of the appellate court decision?

Mr. Combs: Yes, based on the appellate court decision, and on the transcript, both, and on hearing the evidence in this case.

The Court: Motion denied.
(Short recess.) [267]

P. W. SEALS.

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Combs: Doctor Seals, you are a physician and surgeon, licensed to practice in the State of California? A. I am.

Q. What are your qualifications for such?

A. I graduated from U. S. C., medical, in 1920. I have been practicing steady ever since.

Q. You have been connected with the State Compensation Insurance Fund for a period of time?

A. I was medical director two years for them.

Q. What has been the nature and general character of your practice?

A. It has been largely industrial: that is, treating accidents occurring in industry.

Q. Have you had any experience with bone injuries, muscle and tissue injuries?

A. Practically all of those are of that type of injury, yes.

Q. I presume during that period of time you have treated a large number of cases? A. I have.

Q. Can you give us some idea, just roughly?

A. I would say on an average there are from three to [268] five new cases every day, and in 23 years that would be quite a number of cases.

Q. Have you examined America Olvera, the plaintiff in this case? A. I have.

Q. On more than one occasion? A. Yes.

(Testimony of P. W. Seals)

Q. How frequently?

A. October 11, 1938, and then on January 18, 1940.

Q. Did you, on October 11, 1938, in connection with the examination, see certain X-rays, and examine certain X-rays? A. I did.

Q. I hand you Plaintiff's Exhibit 3 in this matter, which was Plaintiff's Exhibit 5 in the other matter, which consists of three X-ray films purporting to have been taken in May, 1938, and I will ask you to examine those films and tell the jury whether they are the films you examined in connection with your examination of the plaintiff in 1938?

A. They appear to be, yes.

Q. What part of her body do these films show?

A. They show the back, taken for the vertebrae.

Q. Would that be the lower dorsal and lumbar vertebrae? A. Yes.

Q. Will you explain to the jury what those three films show?

A. This film shows a compression fracture of the [269] vertebrae of the twelfth dorsal, the first lumbar, and also the second lumbar.

The Court: Mr. Clifton, which exhibit is that?

The Clerk: This is part of Plaintiff's Exhibit 3.

The Court: Proceed.

Q. By Mr. Combs: Is there any displacement of the fragments indicated there? A. No.

Q. Is there any disruption of the structure of the vertebra itself?

A. Except as the compression shows in the body of the vertebra.

(Testimony of P. W. Seals)

Q. Only that? A. Yes.

Q. Did you have, on the occasion of your examination of America Olvera in October, 1938, an opportunity to take any X-rays of your own?

A. Yes, I did.

Q. We have them here. Are you able to state which of those are yours?

A. They should have my name on them. These are the ones.

Q. That would be former exhibit Defendants' A; presently Plaintiff's 5. Can you state what observations you can make with respect to the showing produced by those pictures?

A. They show the same condition, except the bones show more evidence of healing. The lines of the fracture are not [270] as prominent.

Q. Do the positions of the vertebrae as shown in this picture show any deviation from the normal position and curve of the spine? A. No.

Q. Do they appear to be practically the normal curve of the spine?

A. Practically the normal curve, with a very slight exception right at the region of the fracture.

Q. What would be the designation of the vertebrae?

A. 3. This one very slightly.

Q. Name it.

A. The twelfth dorsal; the first lumbar and the second lumbar.

Mr. Marcus: If I am not mistaken, I believe the doctor stated two before.

(Testimony of P. W. Seals)

Mr. Combs: No, he stated three.

Mr. Marcus: On his direct testimony.

Mr. Combs: That's right.

The Court: You are referring to what?

Mr. Marcus: On his direct testimony at this time, when he was first called, I believe the doctor stated two vertebrae.

Q. By Mr. Combs: You were mistaken.

The Court: He may correct it.

A. After seeing the picture more carefully I observe [271] there is a slight fracture; there is another slight fracture.

Q. By Mr. Combs: You did state there were two?

A. I stated there were two, but I corrected it. The third one is the same condition regarding the vertebrae indicated in the other X-ray examinations taken at the same time as this one.

Q. What do you call that, a shadowgraph?

A. A stereoptic view, taken from the front to the back. I can't see any evidence of any injury to the vertebrae in that view of the picture.

Q. There isn't any evidence in that picture, is there, of any bone fragment in the spinal cavity? A. No.

The Court: Mr. Combs, it would appear to the court this is an important matter, and I think you should bear in mind the rule in regard to leading questions.

Q. By Mr. Combs: Is there any evidence—

The Court: It has been answered. You don't need to go over it.